No. 137.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

EDWARD H. PARDEE and ARABELLA D. HUNTINGTON, Executrix, and CHARLES H. TWEED and ISAAC E. GATES, Executors, of COLLIS P. HUNTINGTON, Deceased, *Plaintiffs in Error,*

vs.

A. D. ALDRIDGE, A. F. HARDIE and W. G. MOWRY, Trustees for J. E. DOWNES and Associates, *Defendants in Error.*

BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR.

W. J. MORONEY,

Counsel for Defendants in Error.

STATEMENT OF THE CASE.

(References are to Printed Record.)

Not having been furnished a copy of brief for plaintiffs in error, we deem it proper to make the following preliminary statement of the case:

On May 21, 1898, A. D. Aldridge, A. F. Hardie and W. G. Mowry, suing as trustees of the legal title for J. E. Downes and Associates, creditors of the Texas Trunk Railroad Company, as variously organized, brought suit of "trespass to try title," in the District Court of Dallas County, Texas, against Edward H. Pardee and Collis P. Huntington, to recover judgment for title and possessions of certain lands described in

plaintiffs' petition, which had formerly been owned by said Texas Trunk Railroad Company, hereinafter for brevity designated "Railroad Company." These lands may for convenience and clearness be divided into two classes:

First—A tract of 25 acres in the City of Dallas, conveyed to the Railroad Company by Hughes & Slaughter by deed bearing date March 13, 1880, and commonly designated in the record as the "Hughes & Slaughter tract," and a tract of 11.92 acres, adjoining the City of Dallas, conveyed to the Railroad Company by S. R. Mays and wife by deed bearing date February 2, 1881, and commonly designated in the record as the "Mays tract," there being excepted from both tracts a railroad right of way 100 feet wide, as to which plaintiffs disclaimed ownership. (R p. 150.) These two tracts will for convenience be designated as the "Dallas lands."

Second—Sundry rural tracts in Dallas, Kaufman and Houston Counties, Texas, and sundry town lots in the towns of Kaufman, Kemp and Crandall, which had been conveyed to the Railroad Company as variously organized, by sundry persons and on various dates, as a "bonus" to induce the construction and extension of the railroad. All these tracts will for convenience be collectively designated as the "bonus lands."

On the trial the court peremptorily instructed the jury to find for plaintiffs as to the "bonus lands," and there was verdict and judgment accordingly. (R. pp. 17, 18, 40.)

As to the "Dallas lands," the court submitted certain special issues to the jury, which were duly answered, the court peremptorily directing the answers to several of these issues. (R. pp. 18-24.)

Both plaintiffs and defendants moved for judgment, (R. pp. 39, 40), whereupon, on July 25, 1899, judgment was rendered for plaintiffs as to the "bonus lands," and for defendants as to the "Dallas lands." (R. pp. 40-53.) Both plaintiffs and defendants appealed to the Court of Civil Appeals, Fifth Supreme Judicial District of Texas. On June 30, 1900, the Court of Civil Appeals rendered judgment af-

firming the judgment of the district court in favor plaintiffs as to the "bonus lands," and reversing the judgment of the district court as to the "Dallas lands," and rendering judgment thereof in favor of plaintiffs. (R. p. 210.) Defendants filed a motion for rehearing, (R. p. 211), which was overruled, (R. p. 227), whereupon defendants presented to the Supreme Court of Texas a petition for writ of error, which was denied on January 24, 1902. (R. p. 227.) This petition for writ of error is not in the record, and it therefore does not appear upon what grounds a writ of error was prayed, or that any Federal questions were raised in the petition.

Defendant Collis P. Huntington having died, his executrix and executors were made parties and joined with defendants Edward H. Pardee in applying for a writ of error from the United States Supreme Court to the Court of Civil Appeals, which writ was allowed by the Chief Justice of said Court of Civil Appeals on June 21, 1901, (R. p. 230), and a transcript of the record, together with the writ of error and assignment of errors, was filed in the Supreme Court of the United States on July 17, 1901. (R. p. 245.)

The assignments of error, by which it is sought to present certain Federal questions, are based upon the contention that the Court of Civil Appeals failed and refused to give proper effect to certain decrees and foreclosure sales in the United States Circuit Court for the Northern District of Texas, upon which plaintiffs in error relied as muniments of title. (R. pp. 231-233.)

In order to determine the bearing of these assignments, it becomes necessary to present a statement of the history of the title to the lands in controversy, omitting all matters that throw no light on the questions now presented.

Most of the material facts were embraced in a written agreement, found in the printed record, pages 75 to 124, inclusive. In addition to this agreement, testimony was introduced on the question whether or not the property in controversy, or any of it, was actually acquired or used for railroad purposes. From this agreed statement, and the

special findings of the jury on the question of the purpose for which the property was used and acquired, we make the following statement:

STATEMENT OF THE TITLE.

(1) The Texas Trunk Railroad Company was incorporated under the laws of the State of Texas, on November 6, 1879. (R. p. 76.)

(2) On March 22, 1880, the Railroad Company executed to the International Trust Company, as trustee, a mortgage on its railroad, etc., describing the mortgaged property as follows:

"All and singular the railroad of the party of the first part, as the same now is or may hereafter be constructed from its terminus, in or near the City of Dallas and State of Texas, southeastwardly through the counties of Dallas, Kaufman, Henderson, Anderson, Cherokee, Angelina, Tyler, Hardin and Jefferson, to the Gulf Coast, at or near Sabine Pass, together with a branch from some point on the main line, to, and through the counties of Jasper and Newton, to the boundary line between the States of Texas and Louisiana, in all a distance of about three hundred and fifty miles, including the right of way, roadbed, superstructure, iron, ties, splices, chairs, bolts, nuts, spikes, all lands and depot grounds, station-houses and depots, viaducts, bridges, timber and materials and property purchased and to be purchased for the construction and equipment of said road; all the locomotives and cars, and machinery, and all kinds of rolling stock, whether now owned or hereafter to be purchased by the said party of the first part, together with all machine shops, tools, implements and personal property used therein, or upon, or along the lines of said railroad, or at its stations, or any of them, including all appurtenances and appendages of said railroad, and the property of said company now acquired or which may be acquired, in the State of Texas, used for and pertaining to the operation of said railroad; also all the right, title and interest which the said party of the first part now has or may hereafter acquire in and to a certain portion of the lands granted to said party of the first part, by the laws of the State of Texas in such cases made and provided; that is to say, fourteen sections out of sixteen

sections per mile for each and every mile of road constructed and to be constructed, amounting in the aggregate to four thousand and nine hundred sections of six hundred and forty acres each, or three million, one hundred and thirty-six thousand (3,136,000) acres of land, which said lands are to be selected in the manner hereinafter provided." (R. pp. 79, 80.)

(3) The "Hughes & Slaughter tract," now in the City of Dallas, was conveyed to the Railroad Company by deed bearing date March 13, 1880, prior to the execution of the mortgage, (R. pp. 2, 75, 76), but which was not actually delivered until the following September, subsequent to the execution of the mortgage. (R. pp. 131, 204.) At this time the land was outside the city limits, but subsequently, in 1889, the city limits were extended so as to include it. (R. pp. 128, 204.)

(4) The "Mays tract," near, but then and now outside the City of Dallas, was conveyed to the Railroad Company February 2, 1881, subsequent to the execution of the mortgage. (R. pp. 3, 75, 76.)

(5) The "bonus lands" were conveyed to the Railroad Company on various dates from March 3, 1880, to June 14, 1886. As will subsequently appear, the Railroad Company has had three successive organizations under its original charter, each organization constituting under the railroad laws of Texas a separate and distinct corporation. The first corporation was formed, as stated, on November 6, 1879, (R. p. 76); the second on June 15, 1883, (R. p. 84); and the third on November 3, 1886, (R. p. 89.) It is important to note, as will appear from the dates of the deeds. (R. pp. 2-7, 75), that some of these "bonus lands" were acquired by the first company, some by the second, and some by the third.

(6) It was agreed that "all the lands in controversy were deeded to the Texas Trunk Railroad Company by the respective grantors and by deed bearing the respective dates set forth in plaintiff's first amended original petition, * * * and said deeds are the agreed common source of title to the respective tracts therein described." (R. pp. 75, 76.)

It thus appears that each of the three Companies was the common source of title to a part of the lands in controversy, a fact having an important bearing on the questions arising in this case, as will hereafter appear.

(7) Plaintiffs claimed title under sundry deeds, judgments, etc., in favor of creditors of the Railroad Companies, but as no Federal question is sought to be raised on plaintiff's chain of title, and the state courts have established its validity, it is not deemed necessary to set it out here. So far as necessary for the consideration of the questions now involved, the links in plaintiffs' chain of title will be hereinafter pointed out.

(8) The International Trust Company mortgage was foreclosed by decree of the United States Circuit Court for the Northern District of Texas, rendered on January 31, 1883, and the property described in the decree was sold to M. F. Dickinson and associates, and the sale was confirmed on June 6, 1883. On June 15, 1883, the purchasers reorganized under the same name, "Texas Trunk Railroad Company," thus constituting the second corporation of that name, and on June 19, 1883, under order of said court, the property sold was delivered to the second Company, which for purposes of distinction is designated in the record as "Texas Trunk Railroad Company No. 2," the previous and first organization being called No. 1. (R. pp. 82-85.) The decrees of foreclosure and confirmation described the property substantially the same as in the mortgage, no more particular description being attempted. (R. pp. 82-85.) No question arose in this case as to the validity of these foreclosure proceedings; but the important question did arise, whether or not the lands now in controversy, or any of them, were included in the language of description contained in the mortgage and decrees. It is indisputable that some of the lands were not included, because the foreclosure was against the first Company, and some of the property was acquired subsequent to these proceedings, by the second and third Companies, and therefore could not have been included. As we will undertake to show, it was substantially

admitted by plaintiffs in error, in the Court of Civil Appeals, that the description was not sufficient to embrace any of the "bonus lands," and that plaintiffs in error had no title to these lands. On this point the Court of Civil Appeals says: "It is not seriously contended by defendants that the lands in Dallas, Houston and Kaufman Counties, and for which plaintiffs recovered judgment, were embraced. The contention arises over the Hughes & Slaughter tract and the Mays tract." (R. p. 204.) This statement is made to show that in the Court of Civil Appeals plaintiffs in error in effect waived and abandoned any Federal question affecting the "bonus lands," and we will undertake to show that this was, in effect, a waiver of any Federal question as to the Hughes & Slaughter and Mays Tracts, otherwise designated as the "Dallas lands."

(9) On May 18, 1885, a judgment for $149,102.76 was rendered by the District Court of Dallas County, Texas, in favor of E. M. Reardon, against the second Company, or "Texas Trunk Railroad Company No. 2." On June 9, 1885, an execution issued on this judgment to Dallas County, and was levied on the following described property:

"The railroad of the Texas Trunk Railroad Company, including the entire road-bed, track, depots and depot grounds, offices and shops and right of way, appurtenances and the franchises and all other charter powers and privileges of the Texas Trunk Railroad Company, its initial terminus being near the City of Dallas, and its principal office situated in Dallas County, Texas." The levy was also made by proper description of the Hughes & Slaughter and Mays tracts of land, and on certain personal property. On July 7, 1885, the property as levied upon was sold by the sheriff to J. E. Schneider and associates for $119,320, and deed duly executed. On July 13, 1885, under an *alias* execution to Kaufman County, the Kaufman County lands involved in this suit were also sold to J. E. Schneider and associates for $970.

On October 6, 1885, under an execution issued on a decree of the United States Circuit Court, establishing certain claims against the first Company in the original International Trust Company suit, the

marshal sold to said J. E. Schneider and associates property described as follows: "The entire railroad, road-bed, depots, depot grounds, offices, shops, track, iron rails, bolts, ets., and all other property of every other description thereunto belonging from its terminus at or near the City of Dallas to its terminus in Kaufman County, together with the entire right of way, franchises and charter privileges of the Texas Trunk Railroad Company, the said railroad lying and being in the counties of Dallas and Kaufman, and its principal public office being in Dallas County." On November 13, 1885, the purchasers, J. E. Schneider and associates, claiming title under the above three sales to them, reorganized the Company under the same name, thus constituting what is designated in the record as "Texas Trunk Railroad Company No. 3." (R. pp. 86-89.) It was agreed that "the proceedings were sufficient to vest in this (third) Company the title to all property acquired by the purchasing trustees under the three sales above mentioned." (R. p. 89.) There was no agreement as to what property was actually acquired by the purchasing trustees. It is conceded and not disputed that the purchasing trustees thereby acquired the road-bed, tracks, franchises and charter powers and privileges of the Railroad Company, and that on reorganization these rights and properties passed to the third Company. Defendants in error contend that none of the lands now in controversy were actually acquired by the purchasing trustees, and such is the effect of the judgment of the state courts. Shortly stated, the marshal's sale did not pass title to any of these lands, because it did not describe them. This, we understand, is not disputed. The execution sale to Dallas County, on the Reardon judgment, did not pass title to the Hughes & Slaught and Mays tracts, because the judgment and execution were against the second Company, and, as held by the state courts, these lands were never acquired by the second Company, not having been included in the International Trust Company mortgage and foreclosure sale, and having been originally purchased by the first Company. The same is true of all the Kaufman County lands originally purchased by the

first Company that were sold under the execution on the Reardon judgment against the second Company. In addition, the Kaufman County sale was absolutely void, because the effect of the previous Dallas County sale on the Reardon judgment was, under the Texas railroad statutes, to dissolve the second corporation and pass its chartered rights to the purchasers, and therefore no valid execution sale could be made against it, although unsold assets may have remained. This is the effect of the opinion of the Court of Civil Appeals in construing the Texas railroad statutes, and we understand that the correctness of this construction is not questioned. At any rate, it is not a Federal question.

(10) On August 30, 1888, the Texas Trunk Railroad Company (No. 3) executed to the Central Trust Company as trustee a mortgage on its railroad, etc., describing the mortgaged property as follows: "The railroad already constructed and to be constructed, of the party of the first part, situated in the counties of Dallas and Kaufman, in the State of Texas, extending from the City of Dallas in said county of Dallas, to Cedar Station, in said county of Kaufman, consisting of a main line upwards of fifty miles in length, and also all the rights of way, track, side-tracks, ties, rails, culverts, bridges, stations, water stations, machine shops, structures, rolling stock, locomotives, cars, tenders, machinery, implements, iron, materials, lands, tenements and other property pertaining to said railroad, owned or to be owned by party of the first part, or used or acquired or to be used or acquired by said party of the first part in and for the construction, repairs, renewal, improvements, completions, operation or management of said railroad, and together with the chartered and corporate rights, privileges and franchises now possessed or which shall hereafter be acquired by the party of the first part, including the franchise to be a corporation, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion, remainders, tolls, incomes, rents, issues and profits thereof, and also all the rights, estate, title, interest, property, possession, claim

and demand whatsoever, as well as in law, as in equity, or otherwise howsoever, of the said party of the first part, of, in and to the same and every part thereof." (R. p. 89.)

(11) On September 25, 1889, the State of Texas, by its attorney general, filed an information in the nature of a *quo warranto* in the District Court of Dallas County, against the Texas Trunk Railroad Company, as then organized, for the purpose of having declared forfeited the charter and franchises of the Company. On October 23, 1889, on motion of defendant, the venue was changed to Ellis County. On September 14, 1891, a final judgment was rendered declaring a forfeiture of the Company's charter, dissolution of the corporation, and appointing John H. Gaston receiver of all the Company's property. On appeal by defendant this judgment was affirmed by the supreme court, January 15, 1892. The order appointing Gaston as receiver authorized and directed him to take possession of all the property of the Railroad Company owned at the institution of this suit, or at any time since. Gaston at once qualified as receiver, and he is still acting in that capacity, the receivership never having been closed. However, he did not obtain possession of the property described in the Central Trust Company mortgage above mentioned, the same being in possession of a receiver of the United States court, as will hereinafter more fully appear. (R. p. 91.)

(12) On September 7, 1891, the Central Trust Company brought suit in the United States Circuit Court, Northern District of Texas, against the third Company, to foreclose the Central Trust Company mortgage as above mentioned, and Charles Dillingham was appointed receiver of the mortgaged property. This was seven days prior to the final judgment in the *quo warranto* suit above mentioned. (R. pp. 94, 95.) On December 3, 1892, Dillingham having resigned as receiver, George T. Atkins was appointed to succeed him. (R. p. 97.)

In the mean time, the corporation having been dissolved by decree of the court, as above stated, such proceedings were had that on July 9, 1894, the foreclosure suit in the Central Trust Company mortgage

was revived against John H. Gaston, the receiver appointed in the *quo warranto* suit, and he was substituted for the Railroad Company as defendant. (R. pp. 97, 98.) The situation then was as follows: Atkins, the Federal court receiver, was in possession, as receiver, of so much of the property of the third Company as was in fact embraced in the Central Trust Company mortgage, and no more. The state court receiver disputed the legality of this possession, (R. pp. 97, 98), but that question did not arise in this case, as plaintiffs below did not deem it necessary to raise it, and the possession of the Federal court receiver, so far as the mortgaged property was concerned, may be assumed to have been legal, for the purposes of this case. The Federal court did not undertake to appoint a receiver of *all* the property of the Company. The order was limited to the mortgaged property. (R. pp. 94, 95.) The state receiver, upon dissolution of the corporation, became vested, under the Texas statutes, with the legal title to *all* the property of the third Company, embracing the legal title to the mortgaged property, subject to the mortgage, and the absolute legal title to all property, if any, not included in the mortgage, of course holding the legal title as trustee for creditors and stockholders, and subject to administration under order of court. This statement of the then status of affairs, is, we understand, not disputed.

(13) It now becomes necessary to trace the history of certain collateral matters which become the subject of question in this case. Prior to the dissolution of the first Company by the foreclosure sale under the International Trust Company mortgage, a number of judgments had been rendered in favor of W. B. Nason and others, against the Company, in various state courts. On August 28, 1886, executions which had been issued on these judgments were levied by the sheriff of Dallas County on the Hughes & Slaughter and Mays tracts of land, by specific description, and also on "the entire road-bed, track, railroad, depots, depot grounds, offices and appurtenances from the City of Dallas in the county of Dallas, to the town of Kaufman, Kaufman County, of the Texas Trunk Railroad Company, as constructed in 1882.

Also upon the right of way, franchises, land grant, and all charter rights and privileges of said Company as existing in 1882." On October 5, 1886, the property so levied upon was sold by the sheriff to E. M. Powell and associates, and deed was executed on October 7, 1886. (R. pp. 106-111.) This instrument is commonly designated in the record as the "Powell deed."

On January 13, 1894, Geo. T. Atkins, receiver in the Central Trust Company foreclosure suit, filed a bill in equity in the United States Circuit Court at Dallas against Powell and associates, to cancel the Powell deed. Among other things, complainant alleged that all the property embraced in the Powell deed was embraced in the International Trust Company mortgage and foreclosure sale; that through the subsequent proceedings heretofore mentioned, all said property became vested in the reorganization of the Railroad Company, and in the Company that executed the Central Trust Company mortgage; that the judgments in favor of Nason and others under which the Powell sale was made, were all moneyed judgments without lien against the first Company; that some of said judgments had been paid and others had become dormant before the Powell sale; that the Powell sale was void, because prior thereto the first Company had become dissolved as a corporation through the International Trust Company sale; that none of said judgments had been revived against the trustees of the sold-out Company; that said Powell sale was fraudulent in fact; that the consideration was grossly inadequate; that the executions were issued and the sale was made without the authority of the plaintiffs in said judgments; that the amount bid was not in fact paid by Powell and associates. Complainant prayed for a cancellation of the Powell deed for the benefit of those represented by complainant as creditors, stockholders or otherwise. (R. p. 112.)

On July 16, 1895, a final decree was rendered, cancelling the Powell deed, as prayed for. Subsequently, at a date not definitely stated, Powell and associates executed to Edward H. Pardee a deed purporting to convey all right, title and interest that Powell and as-

sociates acquired by said sale. (R. pp. 106-114.)

(14) On February 26, 1895, the Central Trust Company mortgage was foreclosed by decree of the Federal court, and on August 27, 1895, the mortgaged property was sold, in pursuance to this decree, to Edward H. Pardee. On March 16, 1896, the sale was confirmed, and on April 9, 1896, a deed was made to the purchaser. The decrees of foreclosure and confirmation described the property in the same terms of description used in the mortgage. The deed, however, also embraced the land described in the Powell deed and the decree cancelling the deed. In this respect the deed to Pardee was not authorized by any order of court, and it is of course without effect, except to the extent that the third Company actually owned the property, and to the extent that it was in fact embraced in the Central Trust Company mortgage and foreclosure decree. (R. pp. 98-103.)

(15) The title, or claim of title, of Edward H. Pardee, was acquired for the benefit of himself and Collis P. Huntington. (R. p. 14.)

(16) The claim of title of plaintiffs in this suit was as follows:

(a) Deeds dated December 27, 1897, from the surviving directors of the first Company, acting as trustees, to C. A. Bumpas, trustee, purporting to convey all the property involved in this suit. (R. pp. 119-121.)

(b) Execution sales to C. C. Bumpas, trustee, of the Dallas and Houston County lands involved in this suit, under a judgment in favor of W. F. Thompson, against the first Company, rendered on March 18, 1887, in the District Court of Dallas County, Texas, in a suit instituted November 4, 1881. The Dallas County lands were sold as aforesaid on April 2, 1895, and the Houston County lands on October 1, 1895, and deeds duly executed. (R. pp. 114-116.)

(c) Judgment of the District Court of Dallas County, Texas, in favor of C. C. Bumpas, trustee, and against the surviving directors of the first Company, as trustees, and John H. Gaston, as receiver of the third Company, rendered April 7, 1898, in a suit instituted May 2,

1895, and adjudging to Bumpas, trustee, the title and possession of all the lands involved in this suit. (R. pp. 116-119.)

(d) Deed executed, pending said suit last above mentioned, on January 16, 1896, from C. C. Bumpas, trustee, to Aldridge, Hardie and Mowry, trustees, plaintiffs in this suit, purporting to convey to plaintiffs all the lands involved in this suit. (R. pp. 121-123.)

Plaintiffs thus established title to all the lands involved in this suit, whether originally acquired by the first Company, the second Company, or the third Company, unless defendants acquired a superior title through the proceedings heretofore mentioned. Both the state and Federal courts having held the Powell deed absolutely void *ab initio*, because the execution sale was made against a corporation which had been dissolved, as well as for other reasons, the issues become narrowed to the questions whether of not the International Trust Company and Central Trust Company mortgages and foreclosure sales embraced the lands in controversy, or any of them.

(17) An examination of the language of description in the International Trust Company and Central Trust Company mortgages, (*ante*, paragraphs 2, 10), discloses that these mortgages do not specifically describe any lands, and, giving full effect to all the language, it may be properly condensed into "lands actually used or acquired for railroad purposes." The ultimate issues, therefore, were whether or not, prior to the foreclosure of said mortgages, the lands in controversy, or any of them, were actully used for railroad purposes, or actually acquired for railroad purposes. Of course, the use of the land, or the intention to use it, for railroad purposes *after* the foreclosure, could not broaden the terms of the decree, or confer title to what did not pass by the decree and sale.

(18) On the trial the court held that the uncontradicted evidence showed that the "bonus lands" were not used or acquired for railroad purposes, and under a peremptory charge of the court there was a verdict and judgment for plaintiffs as to these lands, which judgment was in this respect affirmed by the Court of Civil Appeals. (R.

pp. 18, 40, 210.)

(19) As to the Hughes & Slaughter and Mays tracts, the court submitted numerous special issues to the jury, some of which were on the ultimate issues in the case, and others on mere matters of evidence. On the ultimate issues in the case, the jury found:

(a) That all the Hughes & Slaughter and Mays tracts, (except the right of way not sued for by plaintiffs), was originally acquired by the Railroad Company (No. 1) for subdivision and sale into town lots. (See answers to special issues 4, 5, 14, Record, pages 43, 45.)

(b) That prior to the foreclosure of the International Trust Company mortgage, on January 31, 1883, no part of the Hughes & Slaughter tract in controversy was actually used for railroad purposes. See 6 and 7, record, pages 43, 44.

The above are the only findings on what we regard as the material ultimate issues. There was no finding on the question whether or not any part of the Mays tract in controversy was actually used for railroad purposes, prior to the foreclosure of the International Trust Company mortgage. There was no evidence of any such use prior to said date.

There were a number of special findings on the question what the Railroad Company would reasonably need under various circumstances, or did actually need; but we regard these as findings on mere evidential facts at most, as neither mortgage purported to include what the Railroad Company might *need* for railroad purposes, but only what it actually used or intended to use for railroad purposes. As the Company might, in the opinion of the jury, use what it did not need, or need what it did not use or intend to use, we regard these findings as, at most, merely evidential. The special findings also embraced other evidential matters; but we have stated the findings on the ultimate issues in the case.

(We will here anticipate to observe, as we will hereafter more fully show, that under the Texas practice, a verdict on special issues need not include all the issues in the case, that the court passes on all issues of fact not submitted to the jury, that special findings on mere

matters of evidence are not binding on the court, and may be ignored, and that special findings on ultimate issues are binding on the court, whether supported by the evidence or not, and judgment must be rendered accordingly, unless on motion for a new trial such findings on the ultimate issues are set aside and a new trial granted.)

(20) Believing that this court will not undertake to determine the sufficiency of the evidence to support the special findings of the jury on the ultimate issues in the case, we have thus far not undertaken to present the evidence on these issues. With this exception, we have attempted to state all matters necessary to an understanding of the questions now presented, omitting all matters not necessary for this purpose.

However, as we may be mistaken in assuming that the court will not review the evidence on the question of the purpose for which the property in controversy was used or acquired, we have, with some doubt as to its propriety, concluded to present a brief statement of the most direct and important evidence on these issues. In an appendix we purpose to present a more detailed statement, substantially copied from our brief in the Court of Civil Appeals. If it is regarded as immaterial, it, of course, need not be considered.

Bonus Lands.—All these lands were donated to induce the construction and extension of the railroad. (R. pp. 124, 132.) Most of these lands were deeded to the first Company. The lots and blocks in Kemp were deeded to the second Company. The lots and blocks in Crandall, and 7½ acres near Kaufman, were deeded to the third Company. This appears from the dates of the deeds, (R. pp. 2-7, 75), and the dates when the several Companies were organized. (*Ante*, par. 5.) There is no evidence that any of these lands were ever used, or intended to be used, by any of the Companies for any purpose whatever. Most of this property consists of wild timber lands, not adjacent to the railroad. (R. p. 124.)

Use of Hughes & Slaughter and Mays Tracts.—There is absolutely no evidence that prior to the foreclosure of the International Trust

Company Mortgage any use whatever was made of the portions of these tracts in controversy in this suit. The seventh special issue (R. p. 20), erroneously assumed that there was evidence of a minor use, but the jury correctly answered that there was no such evidence. There was evidence that in 1891, eight years after the foreclosure of the International Trust Company mortgage, and five years after the organization of the third Company, a part of a temporary "Y" was found on the Hughes & Slaughter tract, (R. pp. 125, 128), but no witness testified when it was put there.

There were some railroad tracks and small buildings near the west line of the Hughes & Slaughter tract, and a track and switch on the Mays tract, but these improvements were shown without dispute to have been included in the right of way of 100 feet not sued for by plaintiffs, and not recovered by them. (R. pp. 124-126, 128.) See maps opposite page 124 of the record, showing the condition of the Hughes & Slaughter tract on June 14, 1895, and the Mays tract on September 22, 1891, and June 4, 1895. These maps were made long after the International Trust Company foreclosure, and show the condition of the property on the respective dates when the maps were made.

PURPOSE IN BUYING HUGHES & SLAUGHTER AND MAYS TRACTS.

The testimony is undisputed that it was the purpose of the first Company to use as a terminal a tract of about 17 acres not in controversy in this suit, and designated in the record, from its shape, as the "flat iron tract," and located at the junction of the Texas and Pacific, and Texas Trunk railroads. After the foreclosure of the International Trust Company mortgage this property was lost through failure to pay for it. (R. pp. 130, 134.) Its location is shown on plat opposite page 128 of the record. General W. L. Cabell, vice-president and general manager of the first Company, testified that it was the intention to use as much as was necessary of the Hughes & Slaughter and Mays tracts for tracks and switches, and subdivide the balance into town lots. (R. pp. 121, 132.) W. M. Johnson testified that the right of

way of 100 feet not in dispute was much more than the Company actually used or needed. (R. pp. 124-130.) The jury found, in response to special issues 4, 5, 11, 12 and 14, that all of the Hughes & Slaughter and Mays tracts, except the right of way of 100 feet not sued for, was acquired by the Railroad Company for the purpose of subdividing the same into town lots and selling the same to employes of the Company; that considering the reasonable intentions and actual or probable present or future needs of the Company, no part of the Hughes & Slaughter tract, except said right of way, was reasonably necessary for the construction, equipment or operation of the railroad, either at the date of the International Trust Company mortgage or at the date of its foreclosure. (R. pp. 19-22.) These findings are given, although, as already stated, some of them are probably of a merely evidential character. (For a substantially complete statement of all the evidence on these issues, see appendix to this brief.)

(21) Both plaintiffs and defendants moved for judgment, both motions being in general terms, and not purporting to present any Federal question. (R. pp. 39, 40.) The court thereupon rendered judgment for the plaintiffs for the "bonus lands," and for defendants for the Hughes & Slaughter and Mays tracts. (R. pp. 40-53.) Plaintiffs moved to reform the judgment, and render judgment for plaintiffs for all the lands in controversy. (R. pp. 23, 57.) This motion was overruled, and plaintiffs thereupon excepted and gave notice of appeal to the Court of Civil Appeals, (R. pp. 60, 61), where this action of the trial court was assigned as error. (R. p. 177.) These assignments were sustained by the Court of Civil Appeals, which rendered the judgment which it was held the trial court should have rendered. (R. pp. 199-210.)

After the entry of judgment in the district court, defendants moved for a new trial, complaining of sundry alleged errors of the court, but not complaining of the verdict as being in any respect contrary to or unsupported by the evidence. (R. pp. 58-60.) This motion having been overruled, (R. p. 61), defendants also appealed; but, as already stated,

the Court of Civil Appeals decided adversely to defendants below. On the trial in the district court, defendants requested numerous special charges to the jury. It becomes necessary to notice only special charges 8, 9, and 12:

Special charge No. 8 requested the court to *peremptorily* direct a verdict for defendants, on the alleged ground that *all* the property sued for was included in the Federal court decree foreclosing the International Trust Company mortgage, thereby assuming, not only that the "bonus lands" were included, but that also the decree included the lands subsequently acquired by the second and third Companies, and also assuming that the evidence in favor of defendants was uncontroverted. (R. p. 34.)

Special charge No. 9 requested the court to *peremptorily* direct a verdict for defendants, on the ground that *all* the property sued for was included in the Federal court decree foreclosing the Central Trust Company mortgage against Gaston, receiver of the third Company, thereby assuming that the third Company had acquired title to all the lands of the first Company and second Company, and that all these lands, including the "bonus lands," were included in the foreclosure, and also that the evidence in favor of defendants, was uncontroverted. (R. pp. 34, 35.)

Special charge No. 12 requested the court to *peremptorily* direct a verdict for defendants, as to the Hughes & Slaughter and Mays tracts, on the alleged ground that these tracts were "brought into the custody of the Federal court" by the decree cancelling the Powell deed, thereby assuming that the Powell deed was valid, (although as already shown, both state and Federal courts held it absolutely void *ab initio*), and also assuming that the decree which cancelled the Powell deed because it was void had the effect of transmitting valid title under the Powell deed, and also assuming that defendants had acquired such title under the Central Trust Company foreclosure, which did not describe the land embraced in the Powell deed, and also assuming that

the evidence to that effect was uncontroverted. (R. pp. 36, 37.)

These charges were all refused, which rulings were complained of by assignments of error 10, 11, and 12, in the Court of Civil Appeals; and the refusal of the Court of Civil Appeals to sustain these assignments is made the basis of the first, second and third assignments in the United States Supreme Court, these being the only specific assignments presented. (R. pp. 231, 232.)

MOTION TO DISMISS.

Defendants in error have filed a motion to dismiss the writ of error for want of jurisdiction, on the grounds that the record does not present any real or substantial Federal question, nor does it appear that any Federal question was presented to the Supreme Court of the State of Texas, or that any Federal question was raised in the proper time and manner in the state courts; and it does appear from the record that said cause was decided by the Court of Civil Appeals on questions of local and general law, not involving any Federal question, and sufficiently broad to support the judgment of said Court of Civil Appeals, without reference to any Federal question or questions that plaintiffs in error may have sought to raise.

ARGUMENT.

Of course we do not question the correctness of the general proposition that when it becomes necessary to determine whether or not the court below properly construed, or gave proper effect to, a judgment or decree of a Federal court, a Federal question is thereby presented. National Foundry, etc., v. Oconto Water Supply Co., 183 U. S. 216, 233, and cases cited. But in order to give this court jurisdiction, it must also appear that the claim of Federal right has been by adequate specification called to the attention of the state court, and that a general claim of Federal right, such as embraced in the fourth and fifth assignments of error in this case, is wholly insufficient. Capital City Dairy Co. v. Ohio, 183 U.S. 238,248,citing Green Bay & Miss.Canal Co.v. Patten Pap r

Co. 172 U. S. 52, 57; Oxley Stave Co. v. Butter Co. 166 U. S. 648, 654, 655. It must also appear that the claim of Federal right is real and substantial, and not merely an asserted Federal right having no colorable foundation in the record. New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 344, and cases cited. It must also appear that the asserted Federal right was properly claimed in the state court, according to the rules of procedure governing the practice of the state court, under such circumstances that the state court actually decided the question, or was under the duty to decide it. Erie Railroad Company v. Purdy, 185 U. S. 148, citing Spies v. Illinois, 123 U. S. 136, 181; Miller v. Texas, 153 U. S. 135, 538; Morrison v. Watson, 154 U. S. 111, 115. The Federal question must be a question of law, not of fact. Therefore, when the question was whether or not the land in controversy was embraced in a patent from the United State, the validity of the patent not being disputed, and the case involved merely the construction of the language of the patent, and the question how far the measurements of the courses and distances carried the boundary, it was held that no Federal question was presented. Sweringen v. St. Louis, 185 U. S. 38, 41. There are other limitations on the jurisdiction now sought to be invoked, which, so far as deemed necessary, will be hereafter mentioned.

The motion to dismiss the writ of error is based upon several grounds, which we will separately present.

(A) The Texas Supreme Court having denied defendants' petition for a writ of error to the Court of Civil Appeals, it is settled that the writ of error from the United States Supreme Court was properly directed to the Court of Civil Appeals, and no question is made on that account. Bacon v. Texas, 163 U. S. 207. The record in this case shows that the Supreme Court of Texas denied defendants' petition for a writ of error, but the record does not contain a copy of the petition, and it therefore does not appear upon what grounds a writ of error was asked.

The Texas Statutes provide as follows:

"Any person desiring to sue out a writ of error before the supreme

court shall present his petition, addressed to said court, stating the nature of the case, and the grounds upon which the writ of error is prayed for, and showing that the supreme court has jurisdiction thereof." R. S. Art. 942.

"If it shall appear to the supreme court, from an inspection of the petition and record, that there is error in said judgment of the court of civil appeals, it shall grant a writ of error returnable in thirty days, in such manner as may be prescribed by the court." R. S. Art. 943.

The petition for the writ of error must contain specific and direct assignments of error. Hodo v. R. R. Co. 88 Tex., 523; Hillard v. White, 88 Tex., 591; Brown v. Elmendorf, 87 Tex. 58. An error of the court of civil appeals not complained of in the petition for writ of error will not be considered by the Supreme Court. I. and G. N. Ry. Co. v. Miller, 87 Tex. 430; Frey v. R. R. Co. 86 Tex. 467.

We understand that the United States Supreme Court will not entertain jurisdiction of a writ of error to a state court, unless the record affirmatively shows that the plaintiff in error has exhausted his remedies in the state courts. Manifestly this does not appear when the record merely shows that a petition was unsuccessfully made to the Supreme Court for a writ of error, without showing on what grounds the petition was based, especially when under the state statutes and settled rulings of the state courts the Supreme Court will consider only such alleged errors as are specifically pointed out in the petition. We are not aware that this precise question has been ruled upon by the United States Supreme Court, but we submit that it can not be properly presumed that any Federal question was raised in the petition for writ of error to the Texas Supreme Court, when the record is silent on the subject.

(B) Federal questions were sought to be raised in the trial court only by requesting special charges to the jury, which charges were refused by the court. No exception was taken to the refusal of these charges. It is true that under the Texas statutes, (R. S. Art. 1320), it is provided that "when instructions asked, or some of them, are refused, * * * they shall constitute a part of the record of the court,

subject to revision for error without the necessity of taking any bill of exceptions thereto." There is, however, nothing in the Texas statutes prohibiting an exception to the refusal of a charge. It is elementary that at common law error can not be assigned on the giving or refusing of a charge to the jury, unless an exception is taken at the bar before the jury retires, and such an exception is duly preserved in a bill of exceptions; and such is the settled practice in the Federal courts, regardless of state legislation dispensing with the necessity for such exception. St. Clair v. United States, 154 U. S. 134. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law." This provision of the Constitution applies to writs of error from the United States Supreme Court to a state court. C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 236. Section 709, U. S. R. S. gives the United States Supreme Court jurisdiction to revise on writ of error final judgments of state courts, subject to certain limitations, among which are that a Federal right must have been "specially set up" in the state court, and that "the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." This statute unquestionably governs the procedure that must be had in the state court in order to give this court jurisdiction, and a Federal right may be sufficiently asserted, according to the rules governing the state practice, and yet its assertion may be wholly insufficient to comply with the above statute. This is too well settled to require citation of authorities. If, as has been settled, that Act of Congress governs the procedure that is necessary in the state court, it is not perceived why the Seventh Amendment should not also govern. We therefore submit that if a party to a suit in a state court desires to secure and preserve the right to have a final judgment revised on writ of error by the United State Supreme Court, he must proceed as required both by the Act of Congress and the Seventh Amendment. His alleged Federal right must be "specially set up and claimed" as prescribed by the Act of Congress; and if this has been attempted by a special charge to the jury, the refusal

of such charge must be excepted to, and the exception preserved in a bill of exceptions, according to the "rules of the common law," as required by the Seventh Amendment, although all of this may be wholly unnecessary under the state practice.

(C) The special charges attempting to raise Federal questions were properly refused, for several reasons wholly independent of the question of the existence or non-existence of a Federal right. It is not deemed necessary to cite additional authority in support of the proposition that when a party desires to raise a Federal question he must do so at the proper time and in the proper manner, and in accordance, not only with the Act of Congress, but also in accordance with the rules of practice governing the state courts, at least when they are not in conflict with any provision of the Constitution of the United States, or any Act of Congress.

If these charges were properly refused, regardless of the existence or non-existence of any Federal right, then no error was committed by the trial court in refusing them, and no error was committed by the Court of Civil Appeals in overruling the assignments of error complaining of their refusal by the trial court, and this court will not review the judgment of the Court of Civil Appeals, if it appears that the rulings complained of were proper, independent of any Federal question, or based upon grounds involving no Federal question. We think it is demonstrable that plaintiffs in error proceeded in direct conflict with the settled rules of practice in Texas courts. This makes it necessary to call attention to provisions in the Texas statutes. The Texas Revised Statutes of 1879 provided as follows:

"Art. 1328. The verdict of a jury is either a general or a special verdict.

"Art. 1329. A general verdict is one whereby the jury pronounce generally in favor of one or more parties to the suit upon all or any of the issues submitted to them.

"Art. 1330. A special verdict is one wherein the jury find the facts only on issues made up and submitted to them under the direction of

the court.

"Art. 1331. The special verdict must find the facts as established by the evidence, and not the evidence by which they are established, and the findings must be such as that nothing remains for the court but to draw from such facts the conclusions of law.

"Art. 1332. A special verdict found under the provisions of the two preceding articles shall, as between the parties, be conclusive as to the facts found.

"Art. 1333. The jury shall render a general or special verdict, as may be directed by the court; and the verdict shall comprehend the whole issue or all the issues submitted to them."

In construing these statutes, in Silliman v. Gano, 90 Tex., 637, it was held that a special verdict must comprehend every material fact put in issue by the pleadings, and that the court can not look to the evidence to aid or supplement the verdict, although the evidence might be wholly without conflict. While the court recognized and enforced this rule, it also disapproved the rule, and suggested legislation on the subject. In the meantime the above statutes had been carried forward without change into the Revised Statutes of 1895. On June 18, 1897, the following statute was passed:

"Section 1. Be it enacted by the Legislature of the State of Texas: That Article 1331, Chapter 13, Title 30, of the Revised Civil Statutes of 1895, be amended so as to read as follows:

"Art. 1331. The special verdict must find the facts established by the evidence, and not the evidence by which they are established; and it shall be the duty of the court when it submits a case to the jury upon special issues, to submit all the issues made by the pleading. But the failure to submit any issue shall not be deemed a ground for reversal of the judgment upon appeal or writ of error, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain

such a finding.

"Sec. 2. The fact that much inconvenience and intolerable delay accrue to litigants in this State, the tendency of which is to prolong litigation and crowd and burden the dockets of the courts, for want of a law authorizing a simple and expeditious method for the decision of controverted questions of fact by special verdict, creates an imperative public necessity requiring the suspension of the constitutional rule which requires bills to be read on three several days, and that this act take effect and be in force from and after its passage, and it is so enacted.

Approved, June 18, 1897."

This statute constitutes chapter 7 of the General Laws of the Special Session of the Legislature in 1897, and was in force when this case was tried in the district court. By this amendment the chancery practice of submitting special issues to the jury was in the main adopted, subject to the important qualification that under the Texas statute a special finding of the jury is conclusive, unless set aside in a proper proceeding, although it may be wholly unsupported by, or contrary to, the evidence. "The findings of the jury upon the issues made by the pleadings in a case, although against the undisputed evidence, or without evidence to support them, can not be disregarded, but must constitute the only basis upon which proper judgment can be rendered. It is probable a different rule should prevail where a finding is not upon an issuable fact, but upon some fact which is merely evidence bearing upon some issue made by the pleadings." Gaines C. J. in Waller v. Liles, 70 S. W. 17, (October 20, 1902), citing Ablowich v. Bank, 67 S. W., 79.

On reading the present statute it will be perceived that the trial judge may submit such special issues as he may deem proper on his own motion, but that he is under no absolute duty to submit any particular issue unless specially requested to do so by a party to the suit, and, in the language of the statute, "upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such finding." The record in this case discloses that

while defendants requested the submission of numerous special charges, they did not request the submission of any special issues whatever, or complain of the findings of the jury on any of the special issues that were submitted. Defendants ignored the finding of the jury on the material issues of the case, and moved for judgment regardless of these findings.

It will now be perceived that the special charges requested by defendants were properly refused for several reasons, not involving any Federal question.

In the first place, it was within the discretion of the court whether to submit the case under a general charge, calling for a general verdict, or to submit the case on special issues, and then determine what judgment should be rendered, and the exercise of this discretion is not subject to review, and obviously involves no denial of any Federal right. Moreover no complaint was or is made as to the manner in which the case was submitted, and any such complaint, if made, would simply raise a question of procedure under the state law, and not a Federal question, and the judgment of the state court of last resort on such a quetion is, of course, final. It may therefore be properly assumed that the trial court adopted the proper practice, so far as mere method of procedure is concerned, in requiring a general verdict as to the "bonus lands," and a verdict on special issues as to the Hughes & Slaughter and Mays tracts.

When the court, in the proper exercise of its discretion, determined to submit these special issues, it of course followed that no charges on the law should be given except such charges as would be calculated to aid the jury in properly answering the issues submitted for their determination. It is obvious that the special charges requested by defendants had no bearing whatever on any of the issues that were submitted to the jury, and that they were properly refused for that reason, even if they, or some of them, expressed correct legal propositions. Cole v. Crawford, 69 Tex. 124. No special issues were requested to which the requested charges would apply. Therefore defendants did not raise any Federal question in a proper manner. It would, perhaps, have been proper practice to have raised a Federal question in the motion for judgment after verdict, but

no Federal question was sought to be raised in the motion filed by defendants. (R. p. 40.) In short, all the special charges were properly refused, because they had no application whatever to the issues submitted to the jury, and no issues were requested to which they would apply. Therefore, even if these special charges expressed correct legal propositions, the trial court committed no error in refusing them, and the Court of Civil Appeals did not err in so holding, and there is therefore no basis for the assignments of error now presented.

In the second place, all the special charges were properly refused, because they were of a peremptory character and were in other respects clearly improper. It can not be and is not pretended that the vidence showed beyond dispute that defendants were entitled to judgment for all the lands in controversy, because of any claim of Federal right. The charge quoted in the first assignment, (R. p. 23), undertook to peremptorily instruct the jury that the decree against the first Company foreclosing the International Trust Company mortgage embraced all of the property involved in this suit, although it is undisputed, as already shown, that a part of the property was never owned by the first Company, but was subsequently acquired by the second and third Companies, and there was no evidence that any of the "bonus lands" were included in the decree, and, as stated by the Court of Civil Appeals, (R. p. 204), "it is not seriously contended by defendants that the (bonus) lands in Dallas, Houston and Kaufman Counties, and for which plaintiffs recovered judgment (in the district court) were so embraced." Neither can it be seriously contended that the evidence showed *beyond dispute* that *all* of the Hughes & Slaughter and Mays tracts were included in the mortgage and foreclosure decree.

Substantially the same criticism may be properly made of the charge quoted in the second assignment of error. (R. p. 232.) It sought to *peremptorily* instruct the jury that the Central Trust Company foreclosure decree against the receiver of the third Company embraced *all* the property involved in this suit, although it was and is substantially undisputed that it did not embrace any of the "bonus lands," and there is

no reasonable color for the contention that the *undisputed evidence* showed that the third Company ever acquired the Hughes & Slaughter and Mays tracts, or that *all* of these tracts were included in the Central Trust Company mortgage and foreclosure decree, even if the third Company owned them.

The charge quoted in the third assignment, (R. p. 232), undertook to *peremptorily* instruct the jury that the decree of the Federal court cancelling the Powell deed "was effectual to establish and to bring into the custody of said court" the Hughes & Slaughter and Mays tracts, "and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land." This charge assumes that the Powell deed was valid, and that the decree of the Federal court which cancelled the Powell deed, because it was void, had the effect of transmitting valid title under the deed, and that defendants had acquired such title either under the Central Trust Company foreclosure, which did not describe the land, or by the deed from Powell and associates made after their claim of title had been cancelled. We do not deem it necessary to discuss these various contradictions, especially as there is a complete answer to this assignment on another ground.

The Court of Civil Appeals decided that the Powell deed was absolutely void *ab initio*, because it was made under an execution sale against the first Company after such Company had been dissolved as a corporation by the International Trust Company foreclosure sale. (R. p. 209.) This ruling rests upon Articles 4260 and 4264 of the Revised Statutes of 1879, providing as follows:

"Art. 4260. In case of the sale of the entire road-bed, track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale and their associates, shall be entitled to have and exercise all the powers and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and

taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits theeof, in the same manner and to the same extent as if they were the original corporators of said company; and shall have power to construct, complete, equip and work the same road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws.

"Art. 4264. Whenever a sale of the road-bed, track, franchise and chartered powers and privileges is made as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority), the directors and managers of the sold-out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses; and the persons so constituted trustees, shall have the authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands."

These statutes went into effect on September 1, 1879, before the Railroad Company was first incorporated. (See Final Title, Sec. 22.)

It is undisputed that the International Trust Company foreclosure sale embraced "the entire road-bed, track, franchise and charter rights" of the first Company, whether it embraced any of the property now in controversy or not. Under the statute, therefore, the original Company was then dissolved as a corporation, and its then directors become statutory trustees of any residuary assets not embraced in the foreclosure sale. The decision of the Court of Civil Appeals to this effect is in accordance with the authorities. Elliot on Railroads, sec. 75; 5 Thomson on Corporations, sec. 6739; R. R. Co. v. Trust Co., 95

Federal Rep. 497, 534. The decision that a valid execution sale can not be made against a dissolved corporation, is also in accordance with the authorities. National Bank v. Colby, 21 Wall, 609. At any rate, these were all questions of local law, upon which the decision of the state court is final. The effect of a foreclosure sale of the entire roadbed, track, franchise and charter rights of a corporation created under the state statutes, is, obviously, a question of local law. Again, the judgments against the first Company, under which the executions were issued, were all rendered in the state courts; the executions were, of course, issued from the state courts, and the proceedings under the executions, including the sheriff's deed to Powell and associates, were all acts of an officer of the state courts. Nowhere does any question of Federal authority arise. In deciding that the Powell deed was void *ab initio*, the Court of Civil Appeals did not decide any Federal question. The effect of this decision was to leave the title to the property in question in the trustees of the first Company, who were not parties to the suit in the Federal court resulting in the decree mentioned in the special charge. Therefore this decree becomes wholly immaterial. The state court having in this respect placed its decision on a question of local law sufficiently broad to support the judgment, this Court will not enquire whether or not any Federal question was properly decided. This rule is now too well settled to require citation of authorities.

It thus appears that none of the special charges properly raised any Federal question that this Court should review.

(E) In the next place, the first and second assignments, (R. pp. 231, 232), have been substantially waived. This presents a point of practice which is perhaps not entirely clear. We have, after proper notice, filed in this Court certified copies of the briefs filed by defendants in error in the Court of Civil Appeals, upon which briefs this case was there submitted. These briefs contain certain admissions, to which we will call attention, which, in our judgment, have the effect of waiving the assignments referred to. The question is, can the

briefs be looked to for this purpose? We think that they can. We will first point out what the briefs show, and then give our reasons for believing that they can be properly considered.

Plaintiffs in error filed two briefs in the Court of Civil Appeals, one as appellants, the other as appellees, as they occupied that dual capacity. These briefs substantially admitted that defendants (now plaintiffs in error), had no title whatever to any of the "bonus lands," and the judgment in favor of plaintiffs below for these lands was sought to be reversed solely on the ground that the plaintiffs had not shown any title to the same, and that it was incumbent on plaintiffs to prove title. In other words, as to the "bonus lands," defendants below relied entirely on the asserted weakness of plaintiffs' title. As plaintiffs' chain of title raised no Federal question, and it is not even claimed that any such question was thus raised, the decision of the state courts affirming the validity of plaintiffs' chain of title is of course final, and the present effect, therefore, of the admissions is, that plaintiffs below owned the "bonus lands," and the controversy becomes limited to so much of the Hughes & Slaughter and Mays tracts as were recovered by plaintiffs below.

This is shown both by the record and by the briefs referred to.

The brief filed in the Court of Civil Appeals by the present plaintiffs in error, as appellants in that court, concludes as follows: "We submit that the judgment in favor of plaintiffs should be reversed and rendered in favor of defendants, *because plaintiffs failed to show title to any of the property in controversy.*" (See page 62 of certified copy on file with the record.)

In the brief filed in the Court of Civil Appeals by the present plaintiffs in error as appellees in that suit, they say:

"As we have said before, the only fair criticism upon the charge of the court is for submitting any issues to the jury at all. The testmony is altogether without conflict, and it was the duty of the court to apply his view of the law to the case as made by the evidence, and instruct the jury accordingly. The court considered that the plaintiffs

had shown title to all the land sued for except the right of way and the Hughes & Slaughter tract and the Mays tract, and he, therefore, in his first instruction (Record, 25) directed the jury to return a verdict in favor of plaintiffs therefor. The defendants, by their appeal in this case, as shown by their brief heretofore filed in support thereof, complain of the judgment so rendered, not because of the method of the court, *but because of the view of the court respecting the sufficiency of plaintiff's title. If the evidence was sufficient to show title, then the court was right in instructing the jury peremptorily to find for the plaintiffs as to the lands which were awarded to them.*" (See pages 110, 111, of certified copy of brief on file with the record.)

In the opinion of the Court of Civil Appeals, (R. p. 204), the court says: "It is not seriously contended by defendants that the lands in Dallas, Houston and Kaufman Counties, and for which plaintiffs recovered judgment, were so embraced" (in the foreclosure decrees).

The Rules of the Court of Civil Appeals provide as follows:

Rule 29, that each assignment (of error) not copied (in the brief) and accompanied with its appropriate propositions and statements, shall be regarded as abandoned."

Rule 40, "When it shall be found that the rules prescribed for the preparation of a case for submission have been fully complied with by the appellant or plaintiff in error, the court will, in its discretion, regard this brief as a proper presentation of the case, without an examination of the record as contained in the transcript, and may found its decision thereon unless the appellee or defendant in error shall, by the time of calling the case, file in the Appellate Court copies of his brief, to be kept there with the transcript, containing his objections, succinctly and definitely, to the grounds of error as presented in the propositions of appellant or plaintiff in error in his brief."

Article 1039 of the Revised Statutes provides for filing opinions of the Court of Civil Appeals, which thereby become part of the record.

It thus becomes manifest that there was no real controversy in the Court of Civil Appeals on the proposition that none of the "bonus

lands" were included in either mortgage foreclosure, but that the correctness of this proposition was substantially, and evenly expressly, admitted by the present plaintiffs in error. This necessarily involved the admission that the special charges which asserted that all the lands in controversy, including the "bonus lands," were so included, were properly refused by the court. This applies to the charges quoted in the first and second assignments of error in this court. (R. pp. 231, 232.) For this and other reasons it was so obvious that these charges were properly refused that the Court of Civil Appeals does not even mention them. The court merely says:

"Holding, as we do, that the lands in controversy were never embraced by the International Trust Company mortgages, it follows that the title to the lands did not pass out of the original Company by the foreclosure proceedings of said mortgage, and it is not necessary for us to discuss the other questions presented by the briefs of the parties." (R. p. 209.)

Can this court consider the admissions in the briefs above referred to? We recognize the general rule that the question of jurisdiction must be answered from the record alone, and that briefs are not strictly a part of the record. But there are qualifications to this rule. While, in this character of case, it would not be admissible to show by matter *dehors* the record that the court *has* jurisdiction, we think it is admissible to show that the court has *not* jurisdiction, or that, if it has jurisdiction, it should not be exercised. Every court has the inherent power to ascertain all matters of fact necessary to the exercise of its jurisdiction. For example, if the court should be informed, in any authentic way, that a case of apparent jurisdiction in fact presented no real controversy, the court would undoubtedly dismiss the case, or order it stricken from the docket; and in determining the question, the court would not consider itself confined to what appeared in the record. This is in principle the same thing. This court is asked to determine an apparent controversy, when there was no real controversy on the question in the Court of Civil Appeals. This court

is asked to rule that the Court of Civil Appeals erred in accepting the admissions of plaintiffs in error, and deciding the case accordingly. As heretofore stated, we understand that the United States Supreme Court will not, on writ of error to a state court, decide any question unless the plaintiff in error shall have first exhausted his remedies in the state court. The law contemplates a real and earnest controversy in the state court, before there shall be any controversy here. It may not be strictly a question of whether or not this court has jurisdiction. The question may perhaps be better stated: Assuming that this court has jurisdiction, should such jurisdiction be exercised, when it is clearly apparent that there was no real controversy on the question in the state court? The matter is not deemed of sufficient importance to warrant further argument, as we think the case can be properly disposed of in our favor on several other grounds.

(F) The writ of error should be dismissed because the real question in controversy is a question of fact, and in no proper sense a question of law. There was and is no controversy as to the validity of either of the Federal court foreclosure decrees. It was and is admitted that they passed title, as against the defendant in each suit, to all the property described in the respective decrees.

It can not, of course, be seriously contended that either decree passed title to property not described in it, or that either decree was binding on parties not before the court, in person or by legal representation. It therefore can not be contended that the decree foreclosing the Central Trust Company mortgage against the receiver of the third Company was in any sense binding on the trustees of the first Company, who were not parties to the suit; and for the same reason the decree cancelling the Powell deed can not be invoked against the trustees of the first Company, whose title is now held by defendants in error. The question of the validity of plaintiffs' chain of title having been disposed of in their favor, the only controverted questions were whether or not the foreclosure decrees described that part of the Hughes & Slaughter and Mays tract claimed by plaintiffs. If it be determined

that the International Trust Company decree did not describe and include the land, it becomes necessary to enquire further; because if the title did not thus pass, the land was never owned by third Company, against whose general receiver the Central Trust Company mortgage was foreclosed. It is perfectly obvious that neither mortgage or decree described any land particularly. Whether or not any land, and if so what land, was included, was left by the very language of the mortgages and decrees, to be determined by reference to extrinsic evidence showing what lands, if any, owned by the respective Companies, were used or acquired for railroad purposes. Where part of the tract was used or intended for railroad purposes, and part not so intended or used, it becomes simply a question of boundary, to be determined from the evidence by the jury, as held by the Court of Civil Appeals. We are unable to distinguish the case in principle from Sweringen v. St. Louis, 186 U. S. 38, 41, holding that when the question was whether or not the land in controversy was embraced in a patent from the United States, the validity of the patent not being disputed, and the case involved merely the construction of the language of the patent, and the question how far the measurements of the courses and distances carried the boundary, no Federal question was thereby presented. See also Provident Savings Society v. Ford, 114 U. S. 695; Metcalf v. Watertown, 128 U. S. 586, to the effect that the mere fact that an action is founded on a judgment or decree of a Federal court does not necessarily present a Federal question. On the ultimate issues in the case, the Court of Civil Appeals held that the findings of the jury were warranted by the evidence, and the Supreme Court of Texas, by refusing a petition for the writ of error, approved this ruling. An examination of the evidence, as recited in the opinion of the Court of Civil Appeals, and as more fully presented in an appendix to this brief, will show that this ruling was unquestionably correct.

Article 1027 of the Revised Statutes of Texas is as follows:

"When the judgment or decrees of the court below shall be reversed, the court shall proceed to render such judgment or decree as

the court below should have rendered, except when it is necessary that some matter of fact be ascertained, or the damage to be assessed, or the matter to be decreed, is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below."

The facts having been made certain, by the agreemnt of the parties as to most of the facts, and the findings of the jury as to the others, the Court of Civil Appeals proceeded under this statute to render such judgment as the court below should have rendered; and this action was approved by the Supreme Court of Texas.

The Court of Civil Appeals held that the trial court "erred in giving the jury peremptory instructions to find certain facts." (R. p. 209.) The matter is not discussed by the court. This ruling was correct, and did not necessitate the remanding of the case for a new trial, for the following reasons:

The facts upon which these peremptory instructions were given were not ultimate facts, but were, at most, merely evidential in character. The charges were erroneous, because in Texas it is provided by statute that a judge "shall not charge or comment on the weight of the evidence." R. S., Art. 1317. It is held to be a violation of this statute for a charge to give undue prominence to parts of the testimony. Randall v. Gill, 77 Tex. 351; Heldt. v. Webster, 60 Tex. 207; Railway v. Harriett, 80 Tex. 73. There are numerous other cases to the same effect, but it is not deemed necessary to cite them. The charges were also erroneous because they assumed that the opinion evidence of the "experts" was conclusive. Head v. Hargrove, 105 U. S. 45; The Conqueror, 166 U. S. 110. It was not necessary to remand the case for a new trial, because the special findings of the jury on merely evidential facts could be ignored as surplusage, and this was done. Hutchins v. Bacon, 46 Tex. 408; Gaines v. Bank, 64 Tex. 18; Walter v. Liles, 70 S. W. 17. The general rule on this subject is well stated in 28 Am. & Eng. Enc. of Law, 390, as follows: "If a special verdict, in addition to the facts at issue, contains conclusions of law, facts collateral to or outside of the issue, or evidence of facts instead of facts them-

selves, such additional matter is surplusage, and may be ignored by the court; and, if the verdict, stripped of its superfluity, is yet sufficient to support a judgment either way under the issues, a motion for a *venire facias de novo* will be overruled." The material issues in this case, under the terms of description used in the International Trust Company mortgage, were whether or not those parts of the Hughes & Slaughter and Mays tracts claimed by plaintiffs were in fact acquired or used for railroad purposes prior to the foreclosure of the mortgage in 1883. It is immaterial to what use the property was *subsequently* put, or for what purpose the portions *not* claimed by plaintiffs were used or acquired, or what the Company may have *needed* under this or that contingency, except as these matters of mere evidence may be considered by the jury determining the above mentioned material issues in this case. The mortgage did not cover, or purport to cover, what the Company might *need,* but only what the Company might use or intend to use for railroad purposes. The Company might, in the opinion of the court or jury, need what it did not use or intend to use, or use or intend to use what it did not need. Moreover, the peremptory charges under consideration and findings of the jury thereunder, make no distinction between the land plaintiffs claim and the land they do not claim. They do not declare for what purposes the portion of the tracts claimed by plaintiffs were used or acquired. They do not declare whether the railroad uses were before or after the foreclosure of the mortgage, or whether on the land claimed by plaintiffs or the land conceded to defendants. They do not even declare that the land in *controversy* was "needed" by the Company. They merely declare that under a supposed contingency, which never happened, the Company would need "as much" as the land in controversy, while, in response to other issues, the jury found directly that *the land in controversy* was not needed. The verdict rendered in response to these peremptory instructions determined no issue in the case, but amounts to a mere finding on some of the matters in evidence in the case. It is not in conflict with the special findings of the jury on the real ultimate is-

sues in the case. On these issues the jury expressly finds that the land claimed by plaintiffs was acquired for subdivision and sale into town lots, which is not a railroad purpose, and that prior to the foreclosure sale the land was not used for railroad purposes. Under these findings the land did not pass by the foreclosure.

We have deemed it proper to allude to the above rules of procedure in Texas, because they are so well established that the Court of Civil Appeals did not deem it necessary to discuss them in its opinion. The distinction, however, between ultimate facts, and facts which are merely evidential in character, is elementary and has been frequently pointed out by this court. Wilson v. Merchants' Loan & Trust Co. 183 U. S. 121; United States Trust Company v. New Mexico, 183 U. S. 585, and cases cited.

The Court of Civil Appeals says, (R. p. 207): "When the case is submitted on special issues, if there is testimony tending to support the findings of the jury, then it is the duty of the court to render judgment in accord with such findings. We are of the opinion that the evidence did not warrant a verdict for defendant, but warranted the findings of the jury on the issues submitted for their determination." Again, (R. p. 209), the court says: "In view of the evidence, we think the trial court erred in giving to the jury peremptory instructions to find certain facts. We are also of the opinion that the evidence supports the findings of the jury on the special issues submitted, and that judgment should have been rendered thereon for plaintiffs."

The above language may be capable of the construction that when the evidence does not support the special findings of the jury, such special findings may be disregarded in rendering judgment. Clearly, however, this is not the meaning of the court. Having held that the evidence was sufficient, it was not necessary to decide what should be done if the evidence had not been sufficient. The exact question has been decided by the Texas Supreme Court in Waller v. Liles, 70 S. W. 17 and Ablowich v. Bank, 67 S. W. 79, since the decision of this case, and had previously been decided in Clark & Loftus v. Pearce, 80 Tex.

146 and Western Union Tel. Co. v. Mitchell, 89 Tex. 441.

It is well settled by these and other cases that the verdict of the jury on the material, ultimate issues in a cause, is binding, regardless of the sufficiency of the evidence to support the verdict, unless a motion to set aside the verdict has been made and overruled in the trial court. Unless a verdict be set aside on motion it is conclusive as to the facts found by the verdict, R. S. 1332. When the facts have been thus found, and no motion to set aside the findings has been made, or such a motion has been properly overruled, and the trial court has rendered an erroneous judgment, it is the duty of the Court of Civil Appeals to render such judgment as the trial court ought to have rendered, and not remand the case for a new trial. R. S. Art. 1027. When no motion has been made to set aside the findings of the jury, or when such motion has been properly overruled, the appellate court, under the present statute, can review the evidence only on such material issues as have not been passed upon by the jury, resolving all such issues, when the evidence is conflicting, in favor of the judgment, but, when the evidence is not conflicting, rendering such judgment thereon, in harmony with the material findings of the jury, as may be proper. Laws 1897, Sp. Ses. Ch. 7; R. S. Art. 1027.

No motion was made by defendants in the district court to set aside the findings of the jury on the ground that they were contrary to the evidence, or on any other ground. A motion for a new trial, under the Texas practice, must be made within two days after the return of the verdict. R. S. Art. 1373. The only motion filed by defendants was filed seventeen days after the return of the verdict, and this motion does not question the sufficiency of the evidence to support the findings. (R. p. 40.) The question of the sufficiency of the evidence to support the special findings was therefore not before the Court of Civil Appeals, and is not before this court. But, as stated by the Court of Civil Appeals, the special findings complained of by plaintiffs in error are fully supported by the evidence, and they would not be disturbed, even if the question of sufficiency of the evidence was

properly before the court. That the evidence was sufficient to support these special findings has been held first by the district court, (R. p. 47), second by the Court of Civil Appeals, (R. p. 209), and third, presumptively at least, by the Texas Supreme Court, in refusing the petition for a writ of error. Even in cases where the United States Supreme Court has jurisdiction to review the facts, it is the settled practice that the concurrent decisions of two courts on questions of fact will be followed, unless shown to be clearly erroneous. Brainard v. Buck, 184 U. S. 99, 105.

But has this court any such jurisdiction in cases arising on writ of error to state courts? We understand that no such jurisdiction exists, whether the facts be found by a jury, or by the court without a jury. Bartlett v. Lockwood, 160 U. S. 357; Noble v. Mitchell, 164 U. S. 367; M. K. & T. Ry Co. v. Haber, 169 U. S. 613; Hedrick v. A. T. & S. F. Ry. Co. 167 U. S. 673; Chemical Natl. Bank v. City Bank, 160 U. S. 646; Egan v. Hart, 165 U. S. 188; Israel v. Arthur, 152 U. S. 355; Dower v. Richards, 151 U. S. 658; Jenkins v. Neff, 186 U. S. 230, 235; Bement v. National Harrow Co. 186 U. S. 70, 83; U. S. Rev. Stat. Sec. 1011.

The effect of these authorities, as we understand them, is that findings of fact in a state court, whether by court or jury, are conclusive on this court, regardless of the question of the sufficiency of the evidence to support the findings.

It is also to be observed that there is no assignment of error that undertakes to raise any such question; and, as already pointed out, the special charges requested by defendants did not properly raise any Federal question, for numerous obvious and sufficient reasons, wholly independent of any question of Federal right. These reasons have already been sufficiently presented.

We have not discussed the fourth, fifth and sixth assignments of error, (R. pp. 232, 233), because we suppose that they are intended merely to reaffirm the first three assignments. If more is intended, we have no means of knowing what it is, and any discussion of the

matter by us would be mere speculation. Tested by themselves, we think these assignments, (4, 5 and 6), are altogether too vague and indefinite to present any question for review. The rule requiring an assignment of error to be definite and certain has been too frequently announced to render citation of authorities necessary.

ARGUMENT ON THE MERITS.

What we have said has had particular reference to the question of jurisdiction. The merits of the case were also incidentally discussed. We will now present further argument on the merits. This case was submitted by plaintiffs in the Court of Civil Appeals substantially on the following propositions:

(1) Plaintiffs' established title to all the land in controversy, except such land, if any, deeded to the first Company, as was embraced, by legally sufficient description in *both* the mortgage foreclosure sales. In other words, the deeds from the trustees of the first Company to Bumpas, and the judgment of Bumpas against said trustees, and against Gaston, receiver of the third Company, can not be collaterally attacked by defendants, under their pleadings.

(2) As to the land deeded to the third Company, the deed being the agreed common source of title, and defendants having shown no title, the judgment in favor of Bumpas against Gaston, receiver of the third Company, and the deed from Bumpas to plaintiffs, established title in plaintiffs.

(3) As to the land deeded to the second Company, the deed being the agreed common source of title, and defendants having shown no title, and it being established and agreed that all the property of the second Company passed to the third Company, the judgment in favor of Bumpas against Gaston, receiver of the third Company, and the deeds from Bumpas to plaintiffs, establish title in plaintiffs.

(4) As defendants do not even pretend that any of the land in controversy deeded to the first Company, except the Hughes & Slaughter and Mays tracts, was embraced in either mortgage foreclosure, the foregoing propositions establish that the judgment of the district court, so

far as it was in favor of plaintiffs, was correct.

(5) As to the Hughes & Slaughter and Mays tracts, defendants can not defeat a recovery by plaintiffs, on account of the sheriff's deed to Powell and associates, because

(a) The execution sale to Powell having been made against the first Company, *after* it had been dissolved as a corporation, and under judgment rendered *before* its dissolution, the sale was absolutely void.

(b) The deed was cancelled in the suit of Atkins, receiver, v. Campbell et al., in the Federal court, because it was void for the reasons above stated.

(c) As Atkins, receiver, recovered the property from Campbell, Powell, et al. before the foreclosure of the Central Trust Company mortgage, and before there was any adjudication that there was any valid mortgage, or that any particular property was embraced in the mortgage, and as Gaston was not a party to the suit of Atkins v. Campbell, Powell et al., said decree cancelling the Powell deed was not, and could not be, so far as Gaston was concerned, an adjudication that the property was embraced in the Central Trust Company mortgage. In other words, when Atkins recovered from Powell, Campell et al., Atkins was receiver in a suit wherein the Central Trust Company was plaintiff and Gaston, receiver of the third Company, was defendant. As between said plaintiff and defendant, the recovery by, and possession of Atkins was not and could not be adverse to either, but was subject to the rights of each, as such rights might be subsequently adjudicated between themselves. At least up to the time of final decree, Atkins, receiver, held all property in his possession or the title and possession of which he may have recovered for the benefit of both the Central Trust Company and Gaston, receiver, or whichever of them should, on final decree, be held entitled to the property, or any part of it. The decree in Atkins, receiver, v. Campbell et al., was not an adjudication in favor of the Central Trust Company, or against Gaston, because neither were parties to the suit, and there was no issue between them, and Atkins recovered on behalf and for

the benefit of both, and their rights, as between themselves, were not adjudicated until the final decree of foreclosure was subsequently passed. The effect, and the only effect of the decree in Atkins, receiver, v. Campbell et al., and all that said decree purported to or could adjudicate, was that Atkins, receiver, recovered the property embraced in the decree for the benefit of both the Central Trust Company and Gaston, receiver, or whichever of them should be held entitled to the property on final decree of foreclosure. In other words, we do not attack the decree in Atkins, receiver, v. Campbell et al., but insist that it be given the effect, and the only effect, it purported to have, and is entitled to receive.

(d As subsequent to the decree in Atkins, receiver, v. Campbell et al., the Central Trust Company mortgage was foreclosed, and as it is established by the evidence and the verdict of the jury that the decree of foreclosure did not embrace that part of the Hughes & Slaughter and Mays tracts now claimed by plaintiffs, the effect of the foreclosure decree and sale was to leave the title to these lands in Gaston, receiver, so far as the parties to that suit, or Powell and associates, may ever have had any title. While it is true that Atkins, receiver, purported to deed the Hughes & Slaughter tracts to Pardee, yet this was done without authority or order of court, and the deed was, in this respect, therefore void. The repeated statements, or rather implications, in defendants' briefs, that Atkins had any authority to convey these lands to Pardee is certainly not supported by, and is plainly against the record.

(e) The Federal court receivership was, in legal effect, terminated on the consummation of the sale to Pardee, and thereafter all unsold property was, in contemplation of law, in the possession of Gaston, receiver.

(f) Bumpas having subsequently recovered judgment for the property against Gaston, receiver, and Bumpas having conveyed to plaintiffs, the title of plaintiffs is established, even though it be held that the Powell deed was valid. The judgment of Bumpas v. Gaston, receiver, can not be collaterally attacked, even though it be held that

sub-proposition (e) *supra* is unsound, and that the *custody* of the property was still in the ostensible Federal receiver, because the *title* was unquestionably in Gaston, and the *title* is all that is in issue in this case.

(g) If sub-proposition (a) *supra* is sustained, the remaining sub-propositions become immaterial and need not be considered. (This proposition was sustained by the Court of Civil Appeals.)

(h) The deeds which Pardee subsequently obtained from Powell and associates conveyed no title, because (a) Powell and associates never had any title to convey, and (b) prior to their deeds to Pardee whatever claim of title they may have had was cancelled by the decree in Atkins, receiver, v. Campbell et al., and (c) whatever title they may have had and that Atkins may have recovered, had passed to Gaston, receiver, from whom it passed to plaintiffs, through the judgment in favor of Bumpas against Gaston, receiver, and the deeds from Bumpas to plaintiffs.

(6) The foregoing propositions cover the main material questions in this case, except the question whether or not that portion of the Hughes & Slaughter and Mays tracts claimed by plaintiffs was included by legally sufficient description, in *both* the foreclosure decrees. We say *both*, because if not embraced in the first foreclosure, the title remained in the trustees of the sold-out Company, and plaintiffs have title through the deeds from said trustees to Bumpas, the judgment of Bumpas against the trustees, and the deed from Bumpas to plaintiffs.

If, however, the land passed by the first foreclosure, it is agreed and established that it became the property of the second Company, and that all the property of the second Company passed to the third Company, and to Gaston, receiver. Therefore unless the property also passed to Pardee under the Central Trust Company foreclosure against Gaston, receiver, the title remained in Gaston, receiver, and the subsequent judgment in favor of Bumpas against Gaston, receiver, and the deeds from Bumpas to plaintiffs, vested title in plaintiffs. It in-

evitably follows, therefore, that as plaintiffs have title under all three Companies, in order to prevent a recovery, defendants must show that the land passed by *both* foreclosures, and it is sufficient for plaintiffs if it appears that the land was omitted from *either* foreclosure.

(7) An examination of the language of the mortgage and foreclosure decrees demonstrates that

(a) The land is not specifically described in either mortgage or decree, and is therefore not included in either, unless legally embraced in the words of general description that were used.

(b) The International Trust Company mortgage and decree has two, and only two, terms of general description (1) property, etc., "purchased and to be purchased *for* the construction and equipment of said road," and (2) appurtenances, etc., "used for and pertaining to the operation of said railroad." Both would be fully embraced in the single phrase, "property actually used or acquired for railroad purposes."

(c) The Central Trust Company mortgage and decree has a single verbose clause of general description, which can be condensed properly into "property owned or to be owned for railroad purposes."

(8) In construing said decrees it is important to note, that while the record contains direct evidence, and special findings of the jury, as to the specific purpose for which the first Company acquired the property, there is absolutely no evidence as to the purpose for which the *third* Company acquired, or attempted to acquire, or pretended to acquire the property, except as the purpose of the Company is shown by its acts in using or not using the property, and the evidence and verdict of the jury establish that neither at the date of the Central Trust Company mortgage executed by the third Company, nor at the date of its foreclosure, was any of the property now claimed by plaintiffs actually used by the Company for any purpose whatever. There is therefore absolutely nothing in the Central Trust Company mortgage or decree that can be construed to include the land in controversy. If this view is correct, it ends the case, and nothing further need be considered. We

will, however, show that the land was not included in the International Trust Company mortgage and foreclosure, the following propositions being submitted for this purpose:

(9) In order to determine what is meant by "railroad purposes" we may properly look to the statutes. Under the statutes land acquired by a railroad company for sub-division and sale into town lots is not acquired for "railroad purposes," and is not included in a mortgage which does not purport to include all property owned by the company, but only such property as is "used or acquired for railroad purposes."

(10) Even if it be held that the property was included in the International Trust Company *mortgage*, the description in the *decree* is so vague and uncertain that it is void, tested by the rules governing judicial sales.

(11) A judicial sale is void for uncertainty unless "the property is described with sufficient certainty to enable all parties to identify it and know what was being sold." It is not sufficient "that there should exist the means of showing at some future time what is otherwise indefinite and uncertain, but that, at the time of the sale, it should be within the power of all who are by the notice invited to become bidders, to *know* what is offered, and that it should not be surmised and guessed at some future time as to what the officer intended to sell."

(12) While a description in a judicial sale will not be pronounced void, merely because it is general, or because the land can not be certainly identified, fro mthe description alone, yet the description, to be valid, must be sufficient to put the owner and purchasers upon such inquiry "as will afford the means of *complete* information."

(13) The principle announced in proposition (12) means that the description must be such "that a person *familiar with the land* (not with the unknown purpose of the owner) can identify it *from the description thus given.*"

(14) Conceding, for the sake of argument, that "lands *used* for railroad purposes" would be sufficient to convey lands *actually, unequiv-*

ocably and visibly used, at the time of the foreclosure and sale, in the operation of the railroad, on the ground that "a person familiar with the land could identify it from the description thus given," it is clear that "lands *acquired* for railroad purposes" is, under the principles above stated, an insufficient description, where at the time of the foreclosure and sale the land is not actually, visibly and unequivocably used for railroad purposes, and it can not be certainly ascertained either from the public records, or from an inspection of the land, or from any other certain, plain and authentic source, for what purpose the land was acquired. Such a description does not "afford the means of complete information," even though there may be accessible information from which it may be "surmised or guessed as to what the officer intended to sell."

(15) Under the principles stated in propositions 10 to 14 inclusive, the description in both the foreclosure decrees were void for uncertainty, so far as the land now claimed by plaintiffs are concerned, even though the court or jury *might now* be of the opinion, from all the circumstances, that they were "acquired for railroad purposes." *Now* is not the time to make certain what was *then* hopelessly uncertain. If this proposition be sustained, it becomes unnecessary to go further: but, even if it be not sustained, the following propositions are submitted in support of our contention that under the verdict of the jury the land in controversy was certainly not embraced in either foreclosure.

(16) Whether or not the lands in controversy, or any of them, were "used or acquired for railroad purposes" by either the first Company or the last, was a question of fact, and not a question of law.

(17) There was sufficient evidence in favor plaintiffs to at least justify and require the submission of said question to the jury.

(18) Even if the court should be of the opinion that there was not sufficient evidence in favor of plaintiffs to warrant the submission of the issue to the jury, nevertheless, as the court, without objection, did submit the issue, upon which the jury found in favor of plaintiffs, and as the verdict was approved by the court and has not

been set aside, and no motion was made by defendants to set it aside, and as defendants do not, by assignment of error, complain of the verdict, and could not do so in the absence of a motion for a new trial in the district court to set aside the verdict, it must be held that the verdict is conclusive, in so far as it is upon material issues, regardless of the evidence upon which it is based.

(19) So far as the verdict was on immaterial or merely evidential issues, it may and should be disregarded in rendering judgment. The judgment must be based upon the verdict of the jury on the ultimate and material issues in the case.

(20) As neither railroad mortgage or foreclosure decree purported to include property "necessary" for the railroad, but they only purported to include property actually used for railroad purposes, and as property might be deemed "necessary" for the railroad without being *actually* used or acquired for railroad purposes, it follows that whether or not the property in controversy in the case was "necessary" for the railroad was an immaterial issue, and, at most, the question of the necessity of the property for the railroad could be looked to merely as *evidence* on the issue whether or not it was in fact intended for railroad purposes.

(21) If, however, it be held that "necessity for railroad purposes" was a material, ultimate issue, the question was whether or not the *particular property in controversy* was so necessary; and the jury having specifically found, that *the particular property in controversy* was *not* reasonably necessary for the "construction, equipment or operation," or for the "construction, repairs, renewals, improvements, completion, operation, or management" of the railroad, and the verdict never having been set aside, and no motion having been made to set it aside, the issue, if it is an issue, is decided in favor of plaintiffs, and the verdict of the jury can not be reviewed in this court, as the record stands, and if reviewed, the verdict is abundantly supported by the evidence.

(22. The findings of the jury, in response to the peremptory in-

struction of the court (to which plaintiffs excepted) to the effect that if the road had been properly constructed and operated, it would need "as much as 25 acres," and "would need sand," is wholly immaterial, and does not in any respect conflict with the special findings mentioned in paragraph 21, *supra,* because

(a) *Said findings do not apply, and do not purport to apply, to the land in controversy,* as shown by the language of the findings themselves, especially when considered in the light of the testimony of *all* the witnesses that the Hughes & Slaughter tract is *utterly unsuitable* for a terminal, however much the road might need a terminal, and the testimony of defendants' witness Whyte that the railroad could get "sand" off its right of way, as well as off the Mays tract, and the improbability that the road would haul sand from the Mays tract for any considerable distance, when the sand could be got along the right of way.

(b) The fact that the findings are qualified by "if the road was properly constructed and operated" renders them too vague to form the basis of any judgment. They amount, at most, to a mere finding on an immaterial and argumentative issue. (Note—If the court had considered that the evidence showed that *the particular property in controversy* was necessary for the railroad, it is quite clear that he would have said so in his peremptory charge, especially when we note the extent to which the court went in charging on the evidence.)

(23 The charges and findings mentioned in paragraph 22, *supra,* are mere charges and findings on the evidence, and evidence on immaterial issues, and should be ignored in rendering judgment.

(24) *The positive and direct findings of the jury that the property in controversy, was neither used nor acquired for railroad purposes, but that it was all acquired for subdivision and sale into town lots, settle the material and only material issues of fact in the case; and, as such findings have not been set aside, and have never been complained of in such a way as to be subject to review, they require that the judgment of the court below, so far as it was against plaintiffs, should*

be reversed and rendered in their favor.

(25) The testimony in the record that at some time or other, no witness knew when or where, there was a Y which extended into the land claimed by plaintiffs, does not affect the result, because

(a) Plaintiffs having shown title from common source, the burden of proof was on defendants, claiming under the mortgage foreclosures, to show what property, if any, was embraced in such foreclosures, and they completely failed to locate the time when or place where said Y was built or operated.

(b) The jury having found that neither at the date of the International Trust Company mortgage, nor at the date of its foreclosure, was said Y on the ground, it follows that the land once occupied by the Y, whenever and wherever it may have been, was not embraced in said mortgage or said foreclosure.

(c) The jury having also found that the Y was not on the ground at the date of the Central Trust Company mortgage, and the undisputed evidence and verdict of the jury showing that every vestige of it had been removed, and the land abandoned, years before said mortgage was foreclosed, it follows that the land once occupied by the Y, whenever and wherever it may have been, was not embraced in the Central Trust Company mortgage or foreclosure.

(d) The evidence having shown, and the jury having found that the use of the land for a Y was merely temporary, to be used only until the construction of a turn-table, the land temporarily occupied by the Y would not be included in either mortgage or foreclosure in any event. The evidence shows that a turn-table was actually begun on the land not claimed by plaintiffs. When the Company used the terminals of other railroads, as it did most of the time, it did not need either Y or turn-table, which was doubtless the reason why the turn-table was never finished.

We confidently submit that the foregoing propositions of law present a correct view of the case. The Court of Civil Appeals considered and sustained a sufficient number of these propositions to show

that plaintiffs were entitled to judgment, and then very properly passed the other propositions without discussion, because their consideration had become unnecessary. We are not yet advised to what extent, if at all, these propositions will be controverted by oppsing counsel. We therefore will not further discuss them now. When we are furnished a copy of brief of opposing counsel, we may, if deemed necessary, and if we shall have the opportunity, submit an argument in reply. We have discovered an inadvertent error of statement on page 2 of this brief, where it is stated that there was excepted from both the Hughes & Slaughter and Mays tracts a right of way 100 feet wide. Plaintiffs disclaimed as to 100 feet on the west side of the Hughes & Slaughter tract, and 200 feet through the Mays tract, and all other tracts traversed by the railroad, and as to this right of way there was no controversy, and defendants recovered judgment for the same. (R. pp. 150, 210, 211.) As already shown, defendants thus recovered all the land actually used for railroad purposes, as well as some land not so used; and, according to the verdict of the jury, which is not excepted to, and which is fully supported by the evidence, defendants thus also recovered all the lands that was ever in fact intended to be used for railroad purposes.

We respectfully pray that the writ of error be dismissed, and, in the alternative, that the judgment of the Court of Civil Appeals be affirmed.

Respectfully submitted,

W. J. Moroney

Counsel for Defendants in Error.

APPENDIX.

STATEMENT OF THE EVIDENCE ON THE QUESTION OF THE PURPOSE FOR WHICH THE PROPERTY IN CONTROVERSY WAS ACQUIRED AND USED.

(1) *Texas Trunk Charter.*—The Texas Trunk Rrailroad Company was chartered November 6, 1879, under the Texas Revised Statutes of 1879, with authority to build a railroad from Dallas to Sabine Pass, with a branch to the Louisiana line, in all about 350 miles. Its authorized capital was $5,000,000. Its paid up capital, so far as the record shows, was $21,000. As thus organized it is designated in the record as the *first Company.* (R. pp. 76, 85.)

In 1883 there was a mortgage foreclosure sale of its entire roadbed, track, franchises and chartered rights, and other property included in the mortgage, and the purchasers reorganized under the original charter, as authorized by statute, thus constituting what is designated in the records as the *second Company.* (R. pp. 82, 85.)

In 1885 there was another sale under execution, etc., and the purchasers reorganized under the original charter, thus constituting what is designated in the record as the *third Company.* (R. p. 89.)

(2) *Common Source of Title.*—The agreed common source of title to the respective tracts of land are sundry deeds to the Texas Trunk Railroad Company, under its successive organizations, most of the property being deeded to the first company. These deeds are as follows:

(3) *The Hughes and Slaughter Tract,* 1680 feet approximately north and south by 650 feet approximately east and west, containing about 25 acres, was deeded to the Texas Trunk Railroad Company (No. 1) by W. E. Hughes and C. C. Slaughter by deed bearing date March 13, 1880, but not actually delivered until several months thereafter, about September 25, 1880, the consideration being $2,500. When purchased this land was in the country, a mile, more or less, beyond the Dallas City limits. In 1889 the city limits were extended to include it. This is the principal tract of land involved in this suit. Plaintiffs

do not claim a strip 100 feet wide on the west side of this tract, this strip including the land used for railroad purposes. (R. pp. 2, 75, 123, 150.)

(4) *The Mays Tract.* 600 feet approximately north and south by 919 feet approximately east and west, containing 11.92 acres exclusive of railroad right-of-way, was deeded to the Texas Trunk Railroad Company (No. 1) by S. P. Mays on February 2, 1881, the consideration being $348.60. This tract is a couple of miles, more or less, from the Hughes & Slaughter tract, and is outside the city limits. Plaintiffs do not claim a strip of land 100 feet on each side of the center of the main track of the railroad, through the tract, this strip, 200 feet wide, including all the land that was ever used by the Railroad Company for any purpose. (R. pp. 2, 75, 128, 150.)

(5) *Bonus Lands.*—All the other lands involved in this suit were donated in aid of the construction of the railroad, and were never used by the railroad. Most of the lands were deeded to the first Company. The lots and blocks in Kemp were deeded to the second Company. The lots and blocks in Crandall, and 7 2-3 acres near Kaufman were deeded to the third Company. (R. pp. 2-7, 75, 124, 132.)

(6) *Original Construction.*—During 1880 and 1881 the road was built from Dallas to Kaufman, about 36 miles, and some grading was done beyond Kaufman. About 476 $1,000 bonds were issued, 152 absolutely and 324 as collateral. A large floating indebtedness was also incurred. (R. p. 80.)

(7) *The Second Company.*—On June 15, 1883, the purchasers under the International Trust Company foreclosure and their associates reorganized the Company with a paid up capital of $540,000, representing the purchased property. (This was $211,185.25 more than the bonded indebtedness established by the foreclosure decree, and $377,500 more than the aggregate of the bids at the sale.) (R. pp. 82, 84.)

(8) *The Extension to Cedar.*—After the reorganization of the second Company, as stated, it made a contract with O. T. Lyon & Co. to extend the road to Cedar, a point upwards of 50 miles from Dallas.

This was done to save the charter from forfeiture, it being necessary, under the law as construed by the attorney general, to build at least 50 miles of road by November 20, 1883. This contract was completed and the Company (No. 2) issued to O. T. Lyon & Co. its note for $130,000 and interest, which was transferred to E. M. Reardon, who held it in trust for O. T. Lyon & Co. and associates. (R. p. 86.)

(9) *The Reardon Suit.*—Suit was brought by Reardon in the District Court of Dallas County, on said $130,000 notes, and on May 18, 1885, he obtained judgment against the Company (No. 2) for $149,102.76, with 10 per cent. interest and costs. (R. p. . .), and execution sales were made under this judgment as heretofore stated. (R. pp. 86, 88).

(10) *The Third Company.*—On November 13, 1885, the purchasers under the Reardon executions and United States marshal's sale reorganized the Company under the original charter, with a paid up capital of $750,000, representing the purchased property. All the property acquired by J. E. Schneider and associates under the several sales above mentioned properly vested in this third Company. (R. p. 89.)

(11) *Proposed Terminal.—Gaston Tract.*—The record contains a map showing that between the Hughes & Slaughter tract on the south, and the T. and P. railroad on the north, there is a tract of about 17 acres in approximately the shape of a flat iron, this tract being referred to in the record as the "flat iron tract." (R. p. 128.)

When the Texas Trunk Railroad Company was incorporated, W. H. Gaston owned this "flat iron tract." He also owned land west of the Hughes & Slaughter tract, and more land on the south, running to Grand Avenue, a distance of about 2,570 feet. Gaston also owned about 400 acres of other land in the vicinity. (R. pp. 138-140.)

The Texas Trunk Company contracted to purchase the flat iron tract from Gaston, and when it was paid for the Company was to have a deed to this tract, and a deed to a right-of-way over his other land to Grand Avenue. There was no written contract except that Gaston executed a deed and turned it over to his attorneys, to be delivered to the

Company when the purchase money was paid. (R. pp. 130-133, 138-140.)

By agreement between Gaston and the Texas Trunk Company, the Company went into possession under this agreement. The Company began the construction of its road on the flat iron tract, extending from the T. and P. railroad along and near the west line of the "flat iron tract" 1,307 feet to the Hughes & Slaughter tract, thence along and near the west line of the Hughes & Slaughter tract 1,680 feet to Gaston's land on the south, thence through Gaston's land 2,570 feet to Grand Avenue.

When the road got into trouble a year or two afterwards, Gaston resumed possession of all the "flat iron tract," except that part occupied by the tracks of the railroad. He afterwards sued the Company for the land occupied by the tracks, on the flat iron tract, and the 2,570 foot strip to Grand Avenue, and obtained judgment for the same. The Company has since been permitted to occupy the land, *but has never had any title to the same*, the deed never having been delivered or the purchase money paid.

The evidence shows that it was the intention of the Company to use the "flat iron tract" for its terminal, and to place thereon its depots, shops, etc. It was considered ample and specially desirable for that purpose, as it was at the junction of the Texas and Pacific, and Texas Trunk. (R. pp. 130-135, 138-140.)

The jury found, in answer to the 19th special issue, that when the Hughes & Slaughter tract was acquired by the Railroad Company it was the intention of the Railroad Company to use the Gaston "flat iron tract" for its terminal, and for depots, shops, etc. (R. p. 23.)

This finding has never been set aside, or in any way excepted to by defendants.

(12) *Purpose in Buying Hughes & Slaughter Tract.*—W. L. Cabell, who was vice-president, acting president, land commissioner and for a time general manager of the first Texas Trunk Company, and who acted for the Company in the purchase of the Hughes & Slaughter tract, testified in reference to said tract as follows: "We bought the 25 acres for

railroad purposes, laying down switches, and such things as that, and if the land was not required, to sell it into lots for the employes to live on. All that was necessary for tracks and switches was to be used for that purpose. When said 25 acres was purchased, it was the intention of the Company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots, and let the men employed by the Railroad Company purchase them and build residences on them, in order to be close to their work. That was the intention of the road, and at the same time they were to use all that was necessary for switches and tracks, and such things as that. There was an old well on the 25 acres tract when we purchased it. All of the land east of the well was to be sold off into lots. That was the understanding between us. That was our idea. I can not tell without some calculation how many tracks could be put on a hundred feet of ground. They generally put them down far enough apart to prevent them from bothering each other; six or eight tracks, though, very easily. We never had but two tracks when I had anything to do with it. We thought the land we would get from Gaston would be ample to put all of the depots and shops on it. We intended to put a car shed on the 25 acres. The depot was just a little building we purchased from somebody, and it was put there for temporary purposes on the Hughes & Slaughter tract, to keep it from being in the way when we built a regular depot. We did not consider at all the contingencies that would arise from nonpayment. We considered the Gaston land very important for the reason that it was closely connected with the Texas and Pacific, and it was in a fine location. That 25 acres is the only land the Company ever bought and actually paid for that is now in the City of Dallas." (R. pp. 131-132.)

This is the testimony upon which the court (over plaintiff's exceptions taken at the time), charged the jury as follows: "At the time it was purchased it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the said railroad, and whatever switches and side tracks

should be necessary in the operation of the road, and if these did not occupy all the land, then to sell lots on the eastern side of the land to its employees so that they might be near their work; no such sales have ever been made, nor has any part of the land been subdivided into lots." (R pp. 18, 63.) In response to the fourth and fifth special issues the jury found that "all but 100 feet off the west boundary line of the Hughes & Slaughter tract was originally acquired by the Texas Trunk Railroad Company for the purpose of subdividing the same into lots and selling the same to employes of the Company." (R. pp. 19, 20.) This finding has never been set aside, or in any way excepted to by defendants.

(13) *Purpose in Buying Mays Tract.*—W. L. Cabell testified as follows: "The Mays tract was bought the same way; that is, the railroad should use whatever was needed for tracks and sand, and the balance was to be divided into lots." (R. p. 132.)

William Whyte, federal receiver, who has been in the employment of the Huntington roads 28 years, testified as follows: "We have been hauling sand from the Mays tract for the last six or seven years to repair the road-bed and for surfacing it and keeping it in order; it was necessary for that purpose. I presume that about two acres of the land was used up to March 16, 1896. There is no other place on the road where we would get sand to ballast the track, *except off the right of way.* This Mays tract is necessary for sand to ballast our track; I do not know how we could get along without it exactly." (R. p. 142.) W. M. Johnson testified: "The Company only used about 1½ acres of the land for sand and gravel." (R. p. 130.)

At some time not shown by the testimony a switch for sand cars was put on the land, extending at no point more than 75 feet from the main track. (R. pp. 126, map, 124.) There is no testimony that any sand has ever been taken beyond the 200-foot strip that is not claimed by plaintiffs, or that any switch was actually put on the land or any sand taken from it, even inside the right of way, prior to the Dillingham

receivership, when the witness Whyte first became connected with the road.

The above is the only basis in the testimony for the following direction by the court to the jury: "It had on it sand. At the time it was purchased it was the purpose and intention of the Railroad Company and its officers to use the sand in the construction and ballasting of the road-bed, and also to place on it such switches and side tracks as might be necessary in the operation of the road; the main track of the road was built across it near the Eastern boundary, and also a spur track running out from the main track (but near to it) across the land so as to reach the sand; sand has since been taken from the land and used in the construction and repairing and ballasting the road; the road has thus occupied about two acres of the tract." (R. p. 42.) This was excepted to by the plaintiffs at the time. (R. p. 63.) It will be observed that the court says nothing about the purpose of the Company to sell the land out into town lots.

In response to special issues 3a and 14, the jury found that the Mays tract "was not bought by the Texas Trunk Railroad Company for use, either immediate or prospective, in the construction, repair or improvement of its railroad," and that "all of that portion of the Mays 11.92 acres tract sued for by the plaintiffs was originally acquired by the Railroad Company for the purpose of subdividing the same into lots and selling the same to employes of the Company." These findings have never been set aside or excepted to by defendants. (R. pp. 19, 22.)

(14) *The Railroad Use of Mays Tract.*—The preceding paragraph states the substance of the evidence on this point. There is absolutely no evidence that the Railroad Company, under any of its organizations, or through any of its numerous receivers, ever used for any purpose whatever any part of said Mays tract beyond the 200 foot right-of-way, which right-of-way is not claimed by plaintiffs.

(15) *The Railroad Use of the Hughes & Slaughter Tract.*—What is said of the Mays tract is substantially true of the Hughes & Slaughter tract, except 100 feet off the west side thereof, not claimed by plaintiffs.

The property has never been used for a terminal, except for short and infrequent intervals. From 1880 to 1884 trains were run over the "flat iron tract," and west on the T. and P. to the Union Depot. Then for about four years they used the Santa Fe depots and terminals. Finally, in 1892, about a mile of new track was built, commencing about 700 yards beyond the Mays tract and extending to the H. and T. C. railroad; and since 1892 all regular trains have run over this new track and the H. and T. C. track to the H. and T. C. depots and terminals. Since 1892 the tracks in actual regular use have been about 700 yards from the Mays tract, and about 1½ miles from the Hughes & Slaughter tract, but the old tracks are occasionally used for switching purposes.

The Railroad Company originally built its main track, commencing at the T. and P. on the Gaston "flat iron tract," thence running across the "flat iron tract" and entering the Hughes & Slaughter tract on its north line, 48 feet from its northwest corner, thence extending south and approaching the west line, finally emerging from the Hughes & Slaughter tract 25 feet from the southwest corner, where the road again enters the Gaston land and extends through Gaston's land some 2,570 feet to Gaston Avenue; the course of the road from this point to the Mays tract not clearly appearing, and not being of any importance in this case. A parallel siding was constructed 12 feet east of the main track, extending from the T. and P. 1,307 feet across the "flat iron tract," and into the Hughes & Slaughter tract, joining the main track 434 feet south of the north line.

These are the only tracks of a permanent character ever constructed on or near the land. There was an old abandoned well without curbing on the land when it was purchased, but it was never used by the railroad. The Company bought a little shanty, without a ceiling, 12x14, and a small tank, and moved them on the land near the north corner, west of the main track. This shanty, worth about $25, was sometimes used for a ticket office, and the tank worth $75 to $100, was used to water the engines and cars. Both were mere temporary affairs, intended for use only until permanent buildings should be erected on the "flat iron tract."

A car shed, consisting of merely a plank roof on poles, worth not over $50, was built near the siding. The foundations for a two-stall round-house were also laid, but at what time does not appear. It only appears that their remains were found on the land in 1892.

At one time a switch extending from the main track west, to a connection with the Santa Fe, but this was taken up when they stopped running to the Santa Fe depots.

In 1891 one branch of a Y was found on the land, extending to about the center of the tract. The witness Whyte *thinks* that both branches were then there, but W. M. Johnson, who surveyed the land September 22, 1891, found only one branch. Witnesses testified that a Y *needs* two branches and a "tail," but no witness testified that this Y was ever thus equipped, or finished in any way. No witness testified when the Y (such as it was) was built.

The witnesses Whtye and Johnson do not agree as to the exact location of the Y, Whyte placing it farther south than Johnson's survey.

The above are the only improvements, structures or appliances ever placed on the land by the Railroad Company.

They would all be included, (except said temporary Y) within a strip of land on the west side, seventy-five feet wide on the north and thirty-five feet wide at the south, allowing ten feet from centers of tracks. (R. p. 170.) *The Y was a mere temporary affair, laid on the surface of the ground, without any grading.* In 1892 the remains of the Y and all buildings were removed, and since then there has been nothing on the land except said original main track and parallel siding.

Twelve feet on each side of the center of the track was ample for all business ever done on the land by the railroad. (The above is the substance of the testimony of all the witnesses.) (R. pp. 124-135, 138-147.)

The court peremptorily charged the jury to find that "the railroad built its main track across the land near its western boundary, and also built a side track on it and a Y near the center of it and extending eastwardly across the land to beyond the center of the land, and also a small house used as a ticket office, and a car shed; it used in the operation of the

road up to 1892 the main and side track and houses." (R. p. 18.)

This was excepted to at the time by plaintiffs as a charge on the evidence, as well as upon other grounds. (R. p. 63.)

In response to special issues the jury found:

(a) That no part of said 25 acres was actually used by the Railroad Company in connection with the operation of the railroad, at the date of the International Trust Company mortgage, March 29, 1880. (The Company did not then own the land.) (R. p. 20.)

(b) That the Railroad Company did not, under any of its organizations, ever actually use for railroad purposes, or in connection with the operation of the railroad, any part of that portion of the 25 acres sued for by plaintiffs, (being all except 100 feet on the west side) other than so much as was occupied by said Y. (R. pp. 20, 21.)

(c) That said Y was only of a temporary character. (R. p.)

(d) That there is no evidence that said Y existed either at the date of the International Trust Company foreclosure, January 3, 1883, or at the date of the Central Trust Company mortgage, August 30, 1888. (R. pp. 20, 22, 23.)

(e) That the Railroad Company was not actually using the Y on the 25 acres tract when the Central Trust Company mortgage was executed on August 30, 1888. (R. p. 22.)

(f) That the land formerly occupied as a Y had been permanently abandoned for such use when the Central Trust Company mortgage was foreclosed on February 26, 1895. (R. p. 21.)

These findings have never been set aside, or in any way excepted to by defendants.

(16) *The Condition of the Hughes & Slaughter Tract.*—At a date not shown, the Santa Fe Railroad was constructed across the tract, entering at its southwest corner and emerging 180 feet north of the southeast corner. About 1885, Commerce Street, 80 feet wide, was opened across the north end, and Exposition Avenue along the east side. The Rapid Transit Street Railway tracks were laid along the east side and on Commerce Street. The land has never been fenced.

It has been used "semi-occasionally" for circuses. Except as stated, it has not been used or occupied in any way. (See map, R. p. 124, and Johnson's testimony, R. p. 124 *et seq.;* Gaston's testimony, R. p. 138 *et seq.*)

(17) *The Alleged Necessity and Suitability of the Hughes & Slaughter Tract for Railroad Purposes.*—(*Note.*— We find it practically impossible to present the testimony on this subject in a condensed and at the same time clear and fair manner. Plaintiffs objected to all the testimony on the grounds of immateriality and irrelevancy, as neither of the railroad mortgages purport to cover property because *necessary or suitable* for railroad purposes, but only such property as *was actually acquired or used* for railroad purposes. It seems, however, to have been thought that the bondholders were entitled to take from the general creditors whatever they *needed,* or might in any event need, whether they had any mortgage on it or not, and on this apparent assumption a curious lot of testimony was admitted. We will present and classify it as best we can.)

(18) *Circumstantial Evidence.*—This tract is the only land *now* in the City of Dallas the railroad ever owned. However, it was not in the city limits until 1889 (R. p. 128), nine years after the International Trust Company mortgage was executed, six years after it was foreclosed, four years after the last Company was organized, one year after the Central Trust Company mortgage was executed, and the very year the State brought the suit which finally forfeited its charter. When the land was purchased the road was in the possession of the Gaston "flat iron tract," under contract of purchase, intending to locate its terminals thereon. (R. p. 130.)

The land is not on or near any other railroad except the Santa Fe, and it is a mile from the Santa Fe stations, two miles from the postoffice, 1,300 feet from the T. & P., 3,000 feet from the H. & T. C. (R. p. 128.) The road has never owned the right of way to the land in either direction; for 2,570 feet on the south and 1,307 feet on the north it simply has a license from Gaston. (R. pp. 129, 138.)

No reason is given for not acquiring or attempting to acquire this right of way, except the unsuitability of the location. (R. p. 140 *et seq.*) The land has never been used except in an occasional and subsidiary manner. From choice, and as a matter of business, the road, under all its organizations, has preferred to use and has used the city terminals of other companies. (R. p. 125.) Under the last *regime* a permanent connection was made with the H. & T. C., 1½ miles south of the land, which had been substantially abadoned for every railroad purpose since 1892. (R. p. 125.) The road stops at Cedar, about 50 miles from Dallas. Early in its history it forfeited its charter right to extend beyond this point by failing to prosecute the work as required by statute. Since 1891 it has had no charter whatever.

The road has never had much business. It had one engine and some 14 cars, mostly wood cars. It and everything connected with it was bought by Huntington and Pardee for $250,000. The road itself seems to have been chronically insolvent, but there is no evidence that the stockholders and bondholders, and Huntington and Pardee were insolvent, and no reason is suggested by the evidence why they, or some of them, should not have equipped and used the land for terminals, etc., if they ever intended to do so, or thought they had a right to do so, or that it would be good business policy.

The above are some of the circumstances shown by the record that were presented to the jury.

(19) *Opinion Evidence on Imaginary Case.*—The following is taken from the statements of facts:

Counsel for defendants asked the witness Johnson the following question:

Q. "Assuming that the Texas Trunk Railroad should be extended from Dallas, its present terminal, to the southern terminal, Sabine Pass, with a branch over from some point on its main line to Sabine River, making about 350 miles of railroad in length, and having no other railroad property in Dallas, please state whether this 25 acres tract would be necessary for the railroad for terminals, yards and other rail-

road purposes?" The plaintiffs objected to the question and the answer sought to be elicited from the witness, on the ground that it was immaterial and irrelevant, and on the ground that the description in the International Trust Company's mortgage and in the decree foreclosing the mortgage, could not be aided, enlarged, or explained by testimony as to what the railroad company needed, and on the further ground that what the railroad company needed could not be shown by the opinion of the witness. Each of the objections was overruled by the court, and the witness answered as follows:

A. "Yes; the Company would need that 25 acres or some other 25 acres contiguous. They ought to have 40 acres." To the overruling of the above objections, and the admission of said testimony, plaintiffs then and there excepted. (R. pp. 126, 127.)

Counsel for defendants propounded to the witness the following question:

Q. "Considering the locality and situation of the property, (referring to the Hughes & Slaughter tract) is it favorably situated for the handling of freight in connection with other railroads?" The plaintiffs objected to the question on the grounds of immateriality and irrelevancy, and that the matter could not be shown by the opinion of the witness, and that the description of the International Trust Company mortgage and the decree of foreclosure could not be aided, enlarged or explained by any such testimony, which objections were overruled by the court, and the witness answered as follows:

A. "I consider that a very convenient point; it is reached by several streets, and it is within reach of the connecting lines of railroads—the Sata Fe, the Central, and the T. & P." To the overruling of said objections and the admission of said testimony plaintiffs then and there excepted. (R. p. 127.)

Counsel for the defendants then propounded the following question:

Q. "Take the railroad as it existed in 1888, extending from Dallas to Cedar Station, about 50 miles, and if it was in a condition to be

operated, the average condition of Texas railroads, and was not renting terminals, stations, etc., from other lines, but had its own stations and terminals, and were to have its own stations in Dallas, and had its own shops for attending to its engines, and other properties for the operation of the railroad, state whether this 25 acre tract would be necessary for it, that is, without considering the 12 acres in the Gaston (Mays?) tract?" The plaintiffs objected to the above question and to the testimony sought to be elicited thereby, on the ground that it was immaterial and irrelevant, and on the further ground that the description in the Central Trust Company's mortgage or the decree foreclosing the same, could not be aided, enlarged, or explained by any such testimony, and on the further ground that the facts could not be shown by the opinion of the witness. Each of the objections were overruled by the court, and the witness answered as follows:

A. "Yes, sir; I think they would have needed it. It would have given them conveniences which they would not have had on a narrower or smaller piece of land. There would have been warehouses for different branches of business, and machine shops, and turnouts and water stations, and depots, and other things, and I think the 25 acres would have been required for legitimate railroad purposes." To which ruling of the court, and the admission of said testimony, plaintiffs then and there excepted.

The same question was then asked as to the conditions as they existed in 1895, and the same objections were made by plaintiffs and overruled by the court, and the witness made the same answer. To which ruling of the court plaintiffs then and there excepted. (R. pp. 127, 128.)

Counsel for defendants asked the witness Whyte the following question:

Q. "Assuming that the Texas Trunk Railroad Company takes care of its own engine, has its own roundhouse and engines, and its own yards and facilities, what do you say of the necessity of the 25 acre tract for the use of the Company, instead of using other companies'

yards and facilities?"

Plaintiffs objected to the question on the same grounds that they objected to W. M. Johnson's testimony on the same subject. The objections were overruled, plaintiffs excepted, and over said objections and exceptions, the witness testified as follows:

A. "The ground would be absolutely necessary to have terminals; you could not get along without them; all of it would be necessary as it now stands. If the road was extended over the route called for by its charter from Dallas to Sabine Pass, this 25 acres would not be enough." (R. pp. 194, 195.)

Counsel for defendants asked said witness the following question:

Q. "If the Texas Trunk should be put in the average condition of other Texas roads, state whether or not all of the tract would be necessary for it?"

Plaintiffs objected to the question on the same ground that they objected to a similar question propounded to witness Johnson. The objections were overruled, plaintiffs excepted, and over said objections and exceptions the witnesses testified as follows:

A. "All of the tract would be necessary, and more." (R. p. 142.)

(20) *Direct Evidence on the Real Case.*—After testifying as above, the witness Johnson further testified as follows: "The Railroad Company never used or needed more than 12 feet on each side of their track for loading and unloading and delivering of the freight they actually hauled. My testimony as to what they might need is based upon its being a very different railroad from what it was. They did not have any business in 1888 hardly except the wood business. (R. p. 128.) When the railroad was constructed in 1880, that was not a convenient point for receiving and delivering freight. There was no street open to them. Neither Commerce nor Main Street was open. The streets were extended there nine years afterwards." (R. p. 128.)

Q. "Was there any mud out there in the winter time?"

A. "Oh, law! Hum! Black waxy ground! It was not possible to haul any freight to or from that point in wet weather. We generally

have wet winters. The 25 acres was used as a terminal for wood wagons, and for a while they landed the passengers at that box house, and let them stand out there in the wind and rain until they could take them up. That did not last very long." (R. p. 129.)

The following is from the cross examination of the witness Whyte: "I do not know whether 25 feet on each side of the track would cover all the land actually used since 1892—contingencies might come up. You should have enough room for wagons to come between the cars there, so you would not strike the teams; 25 feet is not far enough. In throwing wood off they throw it far enough, so a wagon could come between. I can throw a stick of wood more than 25 feet—some of it slides off. The men out there are not powerfully strong necessarily." (R. p. 143.)

Here counsel for plaintiffs showed the witness the following instrument, filed in the United States Circuit Court in the case of the Central Trust Company v. the Texas Trunk Railroad Company:

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

CENTRAL TRUST COMPANY

v.

TEXAS TRUNK RAILROAD COMPANY.

To the Hon. Judge of said Court:

And now in the above entitled and numbered cause comes Charles Dillingham, Receiver of the Texas Trunk Railroad Company, and with respect unto the court represents:

That the said Texas Trunk Railroad Company is practically without terminal facilities at Dallas, the most important point on its line. The only terminal facility the said road now has at said Dallas is a little depot in East Dallas of the following dimensions, to-wit: a frame house fourteen feet long and ten feet wide.

That said depot is one and one-fourth miles from the business portion of said Dallas and is about one mile from the depot of any other railroad running into said Dallas.

That because of the *want of connection* with other roads all freight handled by said road to and from said Dallas has had to be by it and *at its own expense transferred.* That the expense of making such transfers amount to about $195 per month. That *because of the distant and inconvenient location of said depot* the said railway loses a great deal of freight and passenger traffic which it would obtain at much profit if it had proper terminal facilities and a connection with some trunk railway.

That the cost of making the present terminal facilities adequate would be very considerable, and that *even were such expenditure made still the extreme disadvantage of the want of a terminal nearer the business portion of said Dallas and the want of a connection with some line of railway would still exist, and for these reasons your Receiver suggests that a connection with some line of railway which would permit the use of its tracks and terminal facilities would be both advisable and profitable.*

Your Receiver now shows that he can, by constructing about a mile of road, make connection with the Houston and Texas Central Railway, a trunk line. That said mile of railway, including the price to be paid for right of way, can be constructed at a cost of about Twelve Thousand Dollars, and said Twelve Thousand Dollars can be procured by your Receiver by the sale of certificates at par at 7 per cent., such certificates to be a lien only upon the mile of road so constructed.

Your receiver has caused a survey of said mile of railway to be made and here presents accurate maps and plats thereof, and to locate same the field notes following are submitted: (Here follows field notes.)

Your Receiver further represents that *favorable, desirable and advantageous* arrangements can be made with the Houston and Texas Central Company whereby the said Texas Trunk Railway Company will be permitted to use the tracks and terminal facilities of said H. & T. C. Ry. Co., which are conveniently located and entirely adequate, and this at a nominal cost compared with the cost of transfer of freight, to say nothing of the increase to said Texas Trunk Railway Company in

the way of freight and passenger traffic, and protection to its rolling stock and convenience of repairs to such.

Wherefore, premises considered, your petitioner prays that a decree be entered by your Honors authorizing him to construct said mile of railway as shown by the maps and plats thereof and the field notes above given, including the power to purchase right of way, all necessary material and to contract for the necessary labor, etc., and to issue and sell Receiver's Certificates to the amount of Twelve Thousand Dollars and to use the proceeds thereof in the construction of said mile of railway and to contract with the said Houston and Texas Central Railway for the use of its tracks and terminal facilities and to do any and all such acts as may be reasonably necessary to perfect the contemplated connection, and for general relief, etc.

BARRY, ELLISON & ETHERIDGE,
Attorneys for Receiver.

Wm. Whyte being duly sworn deposes and under oath says, that he is the superintendent of the Texas Trunk Railway Company under and by virtue of employment from Chas. Dillingham, Receiver thereof; that he has read and is familiar with the allegations in the foregoing petition, and that the same are true as therein set forth and that as agent for said Chas. Dillingham, who is not now personally present, he subscribed this affidavit. WM. WHYTE.

Sworn to and subscribed before me this 1st day of February, 1892.

(Seal.) BRYAN T. BARRY,
Notary Public, Dallas Co., Texas.

Endorsed:—No. 193 Eq. Central Trust Co. vs. Texas Trunk Ry. Co. Application of Receiver Dillingham for authority to construct additional road to connect with H. & T. C. Ry. Co. Filed February 8, 1892. J. H. Finks, Clerk, by Chas. H. Lednum, Deputy. Barry, Etheridge & Ellison, Attys. for Receiver. (R. pp. 198-201.)

After reading the above instrument the witness proceeded:

"I signed and swore to that paper. I remember the circumstances now. I did not go into details in that paper; I stated all that I thought

was necessary to state, in a general way. All the facts stated in that paper were true I suppose. I expect I had my books and records before me when I made that statement. I did not then think that the 25 acres was a suitable terminal for that road, *that is, for freight and passengers.* Railroads have shops two or three miles from the depots sometimes. The Texas Trunk never had a telegraph line. I meant that the 25 acres was inconvenient for freight and passengers when I made that statement, but it would be a first-rate place for shops. I think that land would be a very good terminal now, *distinct from the freight and passenger business. It would not be advisable to build terminals in East Dallas for freight and passengers even if we had the money; it would be better to come down town.*"

Q. "You applied in 1892 to the Federal court for permission to spend $12,000 to build a new mile of road and get down to the H. & T. C., with no understanding except the understanding from day to day that you would have the right to use the terminal facilities of the H. & T. C.?"

A. "Yes, sir. I will explain that to the jury. I was superintendent for the receiver, Dillingham, and much of this was through his advice; he was talking with the manager of the Central, I expect, and he may have had some understanding better than I had—I do not know about that. I meant to say that I was carrying out Atkins' instructions. I do not know of any change in the rules between Dillingham's and Atkins' administrations. I can not say that I know anything about the rules between the receiver and the managers of the Huntington road. I do not know who the H. & T. C. road belongs to; I have no proof nor no knowledge about it—we hear these things. I understand that Huntington got charge of the Central along after I went with the Texas Trunk." (R. pp. 144-147.)

The court peremptorily charged the jury that "This was the only land the road owned in Dallas where it terminated; both as originally contemplated and as actually constructed; if the road had been properly constructed and operated, it would have needed *as much as 25*

acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of construction and operation." (R. p. 18.)

In response to special issues 11, 12, 13, the jury found as follows: —Considering the reasonable intentions and actual or probable present and future needs of the Railroad Company:

(a) *None* of that portion of the 25 acres sued for by plaintiffs was reasonably necessary for the "construction, equipment or operation" of the railroad, either when the International Trust Company mortgage was executed, March 22, 1880, or when it was foreclosed, January 31, 1883.

(b) *None* of it was reasonably necessary for the construction, repairs, renewals, improvements, completion, operation or management of the railroad when the Central Trust Company mortgage was executed on August 30, 1888. (R. pp. 29, 30.)

These findings have not been set aside or excepted to by defendants.

(21.) *Tax Assessments.*—Defendants introduced the assessments for taxes in evidence to show payment of taxes, whereupon plaintiffs (over defendants' objections) read the whole instruments to the jury, showing that the Railroad Company rendered 22.08 acres of the 25 acres tract as *not* included in the separate assessment of its "right of way, road-bed, superstructure, depots and grounds upon which said depots are situate, and all shops and fixtures of every kind used in operating said road," and as included in "all lands and town lots in the country, exclusive of right of way and depot grounds." This 22.08 acres would include the whole tract less a strip about 80 feet wide. (R. pp. 147, 148.)

The Mays tract was rendered the same way. (R. pp. 147, 148.) The 11.92 acres in the Mays tract does not include right of way, which was deeded separately. (R. pp. 3, 75.)

(22) *The Aspley Deed.*—R. F. Aspley claimed an interest in the John Grigsby survey as one of Grigsby's heirs.

On March 19, 1889, the Texas Trunk Company obtained from

Aspley a quit-claim deed to a strip of land *50 feet on each side of the center of its track*, from the T. & R. railroad, *through the Hughes & Slaughter tract*, south to the survey line. (R. p. 90.) There is no evidence that the Company obtained or attempted to obtain any deed to any land outside this 100 feet.